

JUN 15 1983

ALEXANDER L. STEVAS,
CLERK

82 - 2056

No. ...

IN THE

Supreme Court of the United States

October Term, 1982

ESCONDIDO MUTUAL WATER COMPANY, CITY OF ESCON-
DIDO and VISTA IRRIGATION DISTRICT,

Petitioners,

vs.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA AND PALA
BANDS OF MISSION INDIANS, and THE SECRETARY OF
INTERIOR in his capacity as trustee for said Bands,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

PAUL D. ENGSTRAND
DONALD R. LINCOLN
JENNINGS, ENGSTRAND & HENRIKSON
A Professional Law Corporation
2255 Camino del Rio South
San Diego, Calif. 92108
(619) 291-0840

LEROY A. WRIGHT
GLENN, WRIGHT, JACOBS & SCHELL
2320 Fifth Avenue, Suite 300
San Diego, Calif. 92101
(619) 239-1211

C. EMERSON DUNCAN II
DUNCAN, ALLEN & MITCHELL
1575 Eye Street, N.W., Suite 300
Washington, D.C. 20005
(202) 289-8400

Attorneys for Petitioners

INDEX TO APPENDIX

	Page
Escondido Mutual Water Co. v. Federal Energy Reg- ulatory Comm'n (1982 9th Cir.) 692 F.2d 1223....	1
Escondido Mutual Water Co. v. Federal Energy Reg- ulatory Comm'n (1983 9th Cir.) 701 F.2d 826	31
Escondido Mutual Water Co., Project 176 et al. (1979) 6 FERC ¶61,189, 20 F.P.S. 5-614 (Opinion 36)	42
Escondido Mutual Water Co., Project 176 et al. (1979) 9 FERC ¶61,241, 19 F.P.S. 5-659 (Opinion 36-A)	310
Act of January 12, 1891, 26 Stat. 712 (Mission Indian Relief Act or MIRA)	379
Preamble	379
§ 2	379
§ 8	379
Act of June 10, 1920, 41 Stat. 1063, as amended, 16 U.S.C. § 791a, et seq. (Federal Power Act or FPA)	380
§ 3(2), 16 U.S.C. § 796(2)	380
§ 4(e), 16 U.S.C. § 797(e)	381
§ 10(a), 16 U.S.C. § 803(a)	382
§ 10(e), 16 U.S.C. § 803(e)	382
§ 10(i), 16 U.S.C. § 803(i)	384
§ 14, 16 U.S.C. § 807	384
§ 15(a), 16 U.S.C. § 808(a)	386
§ 15(b), 16 U.S.C. § 808(b)	387
§ 27, 16 U.S.C. § 821	387
§ 29, 16 U.S.C. § 823	388

**Escondido Mutual Water Co. vs.
Federal Energy Regulatory Commission,
692 F.2d 1223 (9th Cir. 1982).**

Escondido Mutual Water Company, City of Escondido, and Vista Irrigation District, Petitioners, v. Federal Energy Regulatory Commission, Respondent, San Pasqual Band of Mission Indians, Secretary of Interior, etc., et al., Intervenor.

San Pasqual, La Jolla, Rincon, Pauma and Pala Bands of Mission Indians, Petitioners, v. Federal Energy Regulatory Commission, Respondent, Escondido Mutual Water Company, City of Escondido and Vista Irrigation, District, Intervenor.

The Secretary of the Interior, acting in his capacity as trustee for the Rincon, La Jolla and San Pasqual Bands of Mission Indians, Petitioner, v. Federal Energy Regulatory Commission, Respondent, Escondido Mutual Water Company, City of Escondido and Vista Irrigation District, Intervenor.

Nos. 79-7625, 80-7012 and 80-7110.

United States Court of Appeals, Ninth Circuit. Argued and Submitted July 6, 1982. Decided Nov. 2, 1982. As Amended Feb. 23, 1983. As Amended on Denial of Rehearings March 17, 1983. See 701 F.2d 826.

Paul D. Engstrand, Leroy A. Wright, San Diego, Cal., James C. Kilbourne, Washington, D.C., Robert S. Pelcyger, Boulder, Colo., argued, for petitioners; Jennings, Engstrand & Henrikson, Glenn, Wright, Jacobs & Schell, San Diego, Cal., C. Emerson Duncan, II, Duncan, Allen & Mitchell, Washington, D.C., on brief, for Escondido; Raymond N. Zagone, Dirk D. Snel, U.S. Dept. of Justice, Daniel M. Rosenfelt, Dept. of the Interior, Washington, D.C., on brief, for Interior; Fredericks & Pelcyger, Boulder,

Colo., on brief, for San Pasqual, etc.

Joseph S. Davies, Jr., Joshua Rokach, FERC, Washington, D.C., argued, for respondent; John A. Cameron, Acting Asst. Sol., Kristina Nygaard, FERC, Washington, D.C., on brief.

Petition for Review of Orders of the Federal Energy Regulatory Commission.

Before ANDERSON, FERGUSON and NELSON, Circuit Judges.

FERGUSON, Circuit Judge:

This is a petition for review of decisions of the Federal Energy Regulatory Commission ("Commission")¹ in consolidated administrative proceedings involving licensed Project No. 176 in northern San Diego County, California. The project was originally licensed for 50 years in 1924 to the Escondido Mutual Water Company ("Mutual") pursuant to Part 1 of the Federal Power Act ("FPA"), 16 U.S.C. § 791a *et seq.* (1976). Since 1974, the project has been operated under annual licenses issued pursuant to section 15(a) of the FPA, 16 U.S.C. § 808(a) (1976). The proceedings now under review culminated in the issuance of a new 30-year license to Mutual, the City of Escondido ("Escondido"), and the Vista Irrigation District ("Vista").

The decision of the Commission to issue a new license to Mutual, Escondido, and Vista is reflected in its unreported Opinion No. 36, "Opinion and Order Issuing New Licenses, Determining Annual Charges for Past Periods, Prohibiting Certain Activities, Conditionally Providing Interim Operating Procedures, and Terminating Complaint and Investi-

¹The term "Commission" is used throughout this opinion to refer to the Federal Power Commission before October 1, 1977, and to the Federal Energy Regulatory Commission after that date. See 42 U.S.C. §§ 7172(a)(2), 7295(b) (Supp. IV 1980); 10 C.F.R. § 1000.1(d) (1982).

gatory Proceedings," issued February 26, 1979, and No. 36-A, "Opinion and Order on Rehearing Modifying Licenses and Stay, Determining Net Investment and Severance Damages, and Otherwise Denying Rehearing," issued November 26, 1979. Judicial review of these orders is sought by the Secretary of the Interior ("Interior"), Mutual, Vista, Escondido, and San Pasqual, La Jolla, Rincon, Pauma, and Pala Bands of Mission Indians ("Bands").

For the reasons given below, we reverse the Commission's decision and remand for further proceedings.

FACTS

The San Luis Rey River originates near Palomar Mountain in northern San Diego County, California. In its natural condition, it flows through the La Jolla, Rincon and Pala Indian Reservations, and then through the City of Oceanside on its way to the Pacific Ocean. Three other Indian reservations are also within the watershed of the San Luis Rey River — the Pauma, Yuima,² and approximately three-quarters of the San Pasqual. A map of the area and of Project No. 176, Appendix A of the Commission's Opinion No. 36, appears as Appendix I to this opinion.

The San Luis Rey River watershed is now and has historically been the homeland of the La Jolla, Rincon, San Pasqual, Pauma, Pala, and Yuima Bands of Mission Indians. These Indians were the object of Congress's special attention when it enacted, in 1891, the Mission Indian Relief Act ("MIRA"), 26 Stat. 712. Some of the concerns that led to the enactment of MIRA were expressed by the preceding Congress:

²The Yuima tracts are under the jurisdiction of the Pauma Band of Mission Indians. Consequently, while there are six reservations, there are five governing Indian bands.

The history of the Mission Indians for a century may be written in four words: conversion, civilization, neglect, outrage. The conversion and civilization were the work of the mission fathers previous to our acquisition of California; the neglect and outrage have been mainly our own. Justice and humanity alike demand the immediate action of Government to preserve for their occupation the fragments of land not already taken from them.

* * * * *

Much of the land is valueless without irrigation, and the Indians are being deprived of their water rights wherever and whenever the interests of the whites demand the appropriation of such rights.

S.Rep. No. 74, 50th Cong., 1st Sess. 1, 3 (1888).

Pursuant to the provisions of MIRA, the La Jolla, Rincon, San Pasqual and Pala Reservations were withdrawn from settlement and entry by order of President Harrison on December 29, 1891. Trust patents were issued on September 13, 1892, for the La Jolla and Rincon Reservations; on February 10, 1893, for the Pala Reservation; and on July 1, 1910, for the San Pasqual Reservation. The Pauma and Yuima Reservations were also established in accordance with MIRA through the acquisition of quitclaim deeds by the United States in 1891 and 1893. MIRA originally called for the land to be held in trust for 25 years, followed by the issuance of fee patents, but the periods of trust were later extended indefinitely.

Since 1895, the waters of the San Luis Rey River have been diverted out of the watershed to the community in and around the City of Escondido. The point of diversion has been located in the middle of the La Jolla Indian Reservation above all of the other reservations. The conveyance facility, known as the Escondido Canal, traverses parts of the La

Jolla, Rincon and San Pasqual Reservations, as well as some private lands and some federal land administered by the Bureau of Land Management. Its terminus is a storage facility known as Lake Wohlford.

Various agreements, dating back as far as 1894, among Mutual's predecessor, Interior, and the Bands purport to grant rights-of-way for the Escondido Canal across the various reservation lands in return for a guarantee to supply certain amounts of water to the Bands. The validity of those agreements is the subject of separate, currently pending litigation between Mutual and the Bands. *Rincon Band of Mission Indians, et al. v. Escondido Mutual Water Co., et al.*, S.D. Cal. Nos. 69-217-S, 72-276-S, 72-271-S. In a partial summary judgment in that action, certain portions of those agreements were declared void. *Id.* (January 10, 1980).

The diversion and conveyance facilities, including the diversion dam on the La Jolla Reservation, the Escondido Canal, and the various appurtenant roads, pack trails, power lines, telephone lines and the like, and two hydroelectric generating stations have been licensed to Mutual under Project No. 176 since 1924.

In 1922, Vista's predecessor constructed Henshaw Dam on the San Luis Rey River, approximately nine miles above Mutual's diversion dam. Pursuant to a complex contractual relationship, Vista and Mutual have shared the output of Lake Henshaw and the use of the Escondido Canal. Since 1925, approximately one-half of the water transported through the Escondido Canal and stored in Lake Wohlford has been delivered to the community in and around the City of Vista and the other half has been diverted to Escondido. The Henshaw facilities and water rights were not included in the original license for Project No. 176. Prior to 1979, Vista and its predecessors were not licensed by the Com-

mission or mentioned in the license.

Since 1925, Escondido and Vista have captured, impounded and diverted out of the watershed to Lake Wohlford approximately 90% of the flow of the San Luis Rey River at the diversion dam on the La Jolla Reservation. This amounts to an average of approximately 14,600 acre-feet per year. Natural flow accounts for only 2,705 acre-feet of the average annual diversion, the remainder consisting of water stored in Lake Henshaw, and water pumped from the groundwater basin above Lake Henshaw. Approximately 10% of the diverted flow, an average of 1,500 acre-feet per year, has been delivered to the Rincon Reservation pursuant to a 1914 contract entered into by Interior on behalf of the Rincon Band. No project water has been delivered to any of the other reservations. An average of approximately 2,200 acre-feet per year has flowed past the diversion dam, for one of two reasons: either the flows in the river have exceeded the capacity of the diversion facilities, or the facilities have been shut down for periodic maintenance and repair.

The Bands and Interior contend that the diversion of the San Luis Rey River water through Project No. 176 has substantially diminished recharge of the downstream Pauma, and Pala groundwater basins which underlie the Rincon, Pauma and Pala Reservations, and that as a result wells have gone dry and crops have been destroyed. The Bands and Interior also assert that "the future development of these reservations is dependent upon the utilization of these groundwater resources."³

³There was apparently no finding by the Commission or the A.L.J. with respect to these assertions. We express no view as to the degree to which they are supported by the record.

Between 1894 and 1957, the Bands received no compensation for the use of their lands or for the diversion of the river. Since 1957, the San Pasqual Band has received \$25 per year for the use of 3.08 acres of tribal lands licensed in that year.

PROCEEDINGS

On July 25, 1969, the Rincon and La Jolla Bands sued Mutual, Escondido, Interior, and the United States in the federal District Court for the Southern District of California. *Rincon Band of Indians v. Escondido Mutual Water Co.*, *supra*, Nos. 69-217-S, 72-276-S, and 72-271-S. The Bands sought (1) a declaratory order that various water and right-of-way agreements between Mutual, Vista and the Bands were void, (2) an injunction prohibiting the diversion of the San Luis Rey waters into the Escondido Canal, and (3) substantial damages. In January 1980, the district court granted partial summary judgment in favor of the Bands by voiding portions of the contracts. On April 18, 1980, this court denied petitions for interlocutory appeal filed by the parties.

In 1969 and 1970, Interior and the La Jolla, Rincon, and San Pasqual Bands filed complaints with the Commission, alleging that Mutual and Vista had violated the terms of the 1924 license. Among other things, they sought increased annual payments to the Bands throughout the term of the 1924 license. The Commission initiated an investigation, Docket No. E-7562, pursuant to § 306 of the Federal Power Act, 16 U.S.C. § 825e (1976).

In April 1971, Mutual filed an application, subsequently joined by Escondido, for a new "minor"⁴ hydroelectric

⁴Section 10(i) of the Federal Power Act, 16 U.S.C. § 803(i) (1976), allows the Commission to waive conditions in Part I of the Act for a complete project with not more than 2,000 horsepower capacity. Project No. 176, as licensed, falls below that limit.

license for Project No. 176, proposing to continue operating the project as it had during the original license period. In July 1971, the Commission initiated an investigation to consider the extent to which Vista was involved in the operation of Project No. 176 and in the occupancy of Indian lands or other lands of the United States (Docket No. E-7655).

In May and October 1972, Interior requested that the Commission recommend federal takeover of Project No. 176, after expiration of the original license, under section 14 of the Federal Power Act, 16 U.S.C. § 807 (1976). In June 1972, the La Jolla, Rincon, and San Pasqual Bands, acting pursuant to § 15(b) of the Federal Power Act, 16 U.S.C. § 808(b) (1976), applied for a non-power license, under the supervision of Interior, to become effective when the original license expired. This application was later joined by the Pauma and Pala Bands. Under both the federal takeover proposal and the Bands' application for a nonpower license, the licensed facilities would be used almost exclusively for agricultural and recreational development of the Reservations, not for the generation of electricity.

Lengthy hearings were thereafter held before an administrative law judge. He found that Project No. 176 was not constructed or operated for the purpose of generating electricity and that the Commission was therefore without jurisdiction to license it. Accordingly, he recommended dismissal of Interior's complaint, the Vista investigation, and all license applications, including Interior's recapture proposal. If this ruling had remained undisturbed, the consequence would have been that any rights-of-way purportedly conveyed by the original license would have reverted to the Bands once that license expired.

In February 1979, in Opinion No. 36, the Commission reversed the Initial Decision insofar as it dismissed new license applications, but affirmed that decision on the ter-

mination of Interior's complaint proceeding and the Vista investigation. The Commission held that Project No. 176 is subject to its licensing jurisdiction.

With regard to the past operation of Project No. 176, the Commission found that Mutual had violated the license by permitting Vista's joint use of project facilities and by diverting water stored in the Lake Henshaw reservoir owned by Vista and pumped from that reservoir through the Escondido Canal. Consequently, the Commission awarded readjusted annual charges to the La Jolla and Rincon Bands as of September 1969, and to the San Pasqual Band as of May 1970, in amounts based on the operations authorized by the 1924 license. The Commission held that any retroactive compensation for unauthorized use of reservation lands, however, had to be obtained in federal district court.

The Commission granted a new 30-year license authorizing use and control of the project by Mutual, Escondido, and Vista. It imposed conditions on the license which require the delivery of water to the La Jolla, Rincon, and San Pasqual Reservations for domestic, agricultural, and commercial uses. Those conditions were assertedly imposed to ensure that the project would not interfere or be inconsistent with the purpose for which these reservations had been created. No similar conditions were imposed with respect to the Pala, Pauma and Yuima Reservations because, although these reservations lie within the San Luis Rey River watershed below the intake of the Escondido Canal, and are thus affected by the diversion of water into Project No. 176, none of those reservations is traversed by the canal.

Among the conditions included in the new license for the benefit of the Bands are the following:

1. The license will include Vista's Lake Henshaw facilities and a "permanent water operating plan . . . for the

purpose of enhancing the existing fishery . . . and benefiting incidentally the Pauma and Pala Basins." The Commission asserts that this condition will assure, *inter alia*, an adequate water supply for the reservations.

2. The license is subject to reconsideration following the final disposition of the federal district court water rights litigation between the United States, Mutual, Vista and the Bands.

3. The license includes a formula determining annual charges for the use of lands within the La Jolla, Rincon, and San Pasqual Reservations, which, as modified by the Commission's opinion, awards approximately 11½ per cent of the project's net water conveyance benefits to the three reservations traversed by the canal. Also included is an additional annual charge to compensate the Rincon Band for the use of its land for generating power at the Rincon power plant.

4. The licensees are required to release water from the Escondido Canal, as ordered by the Commission, to an "Indian water service area" within the Indian reservations.

Pursuant to the duty imposed on him by section 4(e) of the FPA, 16 U.S.C. § 797(e) (1976), the Secretary of the Interior propounded a number of additional conditions to be included in the project license. The administrative law judge rejected the conditions on the ground they would "destroy the project." In its opinion, the Commission accepted some of the conditions but rejected or modified others because they would prevent the Commission from carrying out its licensing obligations.

In its November 1979 decision on Rehearing, Opinion No. 36-A, the Commission stayed the effective date of the new license for two years after the issuance of that opinion pursuant to section 14(b) of the FPA, 16 U.S.C. § 807(b)

(1976). It gave the licensees until six months after the effective date of the new license to submit exhibits reflecting inclusion of the Henshaw properties, facilities and water rights within the licensed project and providing for a proposed permanent operating plan for the project.

The Commission also, for the first time, determined the amount of Mutual's net investment and the severance damages to which it would be entitled in the event of either federal recapture or issuance of the nonpower license to the Bands. It found that the net investment has been fully depreciated and that there would be no severance damages because no electric utility properties of the licensee would be affected. Additionally, the Commission held that neither the United States nor any new licensees would be required to assume any of the licensee's contracts.

Finally, the Commission held that it had exclusive authority to issue right-of-way permits for the use of public lands for power project purposes. It concluded that section 501(a)(4) of the Federal Land Policy and Management Act, 43 U.S.C. § 1761(a)(4) (1976), did not require the licensees to obtain a right-of-way permit from the Secretary of the Interior.

All parties then filed petitions for review. No. 79-7625 was filed in this court on November 26, 1979 by Mutual, Vista, and Escondido. In it, the petitioners contend that the conditions imposed on the license are too stringent, and that the Commission's resolution of the annual charges, net investment and severance damages issues was unreasonably favorable to the Bands. No. 80-7012 was originally filed by the Bands in the United States Court of Appeals for the District of Columbia Circuit (D.C.Cir. No. 79-2397) on November 27, 1979. No. 80-7110 was originally filed by Interior in the D.C. Circuit on January 25, 1980 (D.C.Cir. No. 80-1111). The latter two petitions were transferred to

this court by a January 29, 1980 order of the D.C. Circuit. In them, the Bands and Interior contend, among other things, that the Commission lacked jurisdiction to license Project No. 176, that the license cannot be issued without the consent of the Bands, that the Commission is required to include in the license the conditions propounded by Interior, that the conditions imposed upon the license by the Commission do not adequately protect the Bands' interests, that the Commission cannot grant rights-of-way across nonreservation federal lands under the jurisdiction of Interior without Interior's consent, and that the license is inconsistent with the purposes for which the reservations were created. All three petitions were consolidated by order of this court filed May 14, 1980.

ISSUES

Of the numerous issues presented to us in the three petitions for review, we need only consider the following:

1. Does the Commission have jurisdiction to license Project No. 176?
2. Can the license be granted without the Bands' consent?
3. Can the license be granted without including all of the conditions propounded by Interior pursuant to the duty imposed upon it by section 4(e) of the FPA, 16 U.S.C. § 797(e) (1976)?

DISCUSSION

I. The Commission's Jurisdiction.

The Commission is authorized and empowered under the FPA to issue licenses

for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or

convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams or the bodies of water over which Congress has jurisdiction under its authority to regulate commerce.

Section 4(e) of the FPA, 16 U.S.C. § 797(e) (1976). At the same time, the FPA makes it unlawful "for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto . . . except under . . . a license granted pursuant to this chapter." Section 23(b) of the FPA, 16 U.S.C. § 817 (1976). The Bands and Interior contend that under these provisions the Commission's licensing authority extends only to projects the purpose of which is the development of electric power. They contend that Project No. 176 is not such a project. Alternatively they contend that the Commission's jurisdiction extends only to power components of projects with a primary purpose of diverting water, and with a secondary or incidental purpose of developing electric power.

The starting point for analysis is the observation that the primary purpose of Project No. 176 is not the development of power. The ALJ found that the project's "predominant and clearly defined purpose" is irrigation, not power production. The Commission agreed, stating that "the principal function . . . is to convey water," Opinion 36 at 95, and that "[t]he generation of electric power is and always has been incidental to the primary purpose of the project," Opinion 36—A at 27. Indeed, the ALJ found that the horsepower generated by the project is "not even the equivalent to that produced by half a dozen modern automobiles," and concluded, in determining that the Commission was without jurisdiction to license the project, that "the production of

power . . . can only be termed *de minimis* . . . especially in light of the miniscule amount of power produced, both in absolute terms and relative to other projects.”

Interior and the Bands do not contend that power generation must be the primary purpose of the project for the Commission to have jurisdiction. Such a contention would be wholly at odds with precedent. Rather, they contend that in this case the power generation aspect of the project is pure makeweight — that it is only included for the purpose of conferring jurisdiction on the Commission.

The Commission did not reach this question, relying instead on a very expansive reading of sections 4(e) and 23(b) of the FPA:

So long as any part of the project is situated on navigable waters, or on public lands or reservations, and so long as that project generates any electric power, however minor in amount and however insignificant to the project as a whole, and so long as interstate or foreign commerce is affected, the works of that project are subject to be licensed and required to be licensed under the Federal Power Act.

Opinion No. 36, at 37-39 (footnotes omitted).

We are required to give great deference to interpretations by administrative agencies of the statutes they are required to administer. *Investment Co. Institute v. Camp*, 401 U.S. 617, 626-27, 91 S.Ct. 1091, 1096-1097, 28 L.Ed.2d 367 (1971); *Sierra Club v. Andrus*, 610 F.2d 581, 602 (9th Cir. 1979), *reversed on other grounds*, 451 U.S. 287, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981). This principle applies to an agency interpretation of the scope of its authorizing statute. *Peters v. Hobby*, 349 U.S. 331, 345, 75 S.Ct. 790, 797, 99 L.Ed. 1129 (1955); *Tennessee Valley Ham Co. v. Bergland*, 493 F.Supp. 1007, 1010 (W.D.Tenn.1980). The question before us, therefore, is whether the interpretation of

section 4(e) put forth by the Commission is a reasonable one.

The FPA empowers the Commission to license projects "for the development, transmission and utilization of power," section 4(e) of the FPA, and requires licenses to be obtained by persons who construct, operate, or maintain facilities "for the purpose of developing electric power," section 23(b) of the FPA. No explicit language in the FPA limits the Commission's jurisdiction to projects where the primary, or a major, or significant, or non-*de minimis* purpose is to generate power. Thus, the broad interpretation advanced by the Commission is not inconsistent with the plain language of the statute, even though that language might equally well have been subject to a narrower interpretation.

Nor did the Commission, by applying its broad interpretation of the jurisdictional statute to the facts of this case, act so unreasonably as to require reversal. This case, unlike one that might someday arise, does not squarely present the question whether the Commission could properly apply its broad jurisdictional formula to a case where the power elements of the project were included as "mere sham and make-weight." There was no such finding in this case, and we decline to make one ourselves at this stage of the proceedings. It suffices merely to note that there must be some point beyond which the mere presence of a power generating element in a much larger project aimed at a different goal could not reasonably be thought to confer jurisdiction on the Commission over the whole project. Where such a line ought to be drawn, in the first instance, is a question for the Commission rather than for this Court. We are not persuaded at this point in the proceedings that the line has been crossed in this case, and we therefore decline to overturn the Commission's assertion of jurisdiction.

Interior and the Bands also assert that at any rate the Commission's jurisdiction is limited to the "power components" of the project. We find no error in the Commission's conclusion, supported by the findings of the A.L.J., that all of the licensed facilities are "physical structures" which "are used and useful in connection with" the power elements of the project, and therefore within the scope of the Commission's jurisdiction. See section 3(11) of the FPA, 16 U.S.C. § 796(11) (1976).

II. *Indian Consent.*

As already noted, Project No. 176 involves various dams, ditches, flumes, powerhouses, and canals, which occupy parts of the Rincon, La Jolla, and San Pasqual Reservations. All three reservations were established pursuant to the provisions of the Mission Indian Relief Act of 1891 ("MIRA"). Section 8 of MIRA provides in pertinent part:

[P]revious to the issuance of a patent for any reservation as provided in section three of this act the Secretary of the Interior may authorize any citizen of the United States, firm, or corporation to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such reservation for agricultural, manufacturing, or other purposes, upon condition that the Indians owning or occupying such reservation or reservations shall, at all times during such ownership or occupation, be supplied with sufficient quantity of water for irrigating and domestic purposes upon such terms as shall be prescribed in writing by the Secretary of the Interior, and upon such other terms as he may prescribe . . . *Subsequent to the issuance of any tribal patent, or of any individual trust patent as provided in section five of this act, any citizen of the United States, firm, or corporation may contract with the tribe, band, or individual for whose use and*

benefit any lands are held in trust by the United States, for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose.

(Emphasis added). The Bands and Interior maintain that under this section the Commission may not license those parts of Project No. 176 which occupy reservation land without the consent of the respective Indian Bands. The Commission disagrees.

A. Does Section 8 of MIRA Require Indian Consent?

Trust patents were issued on September 13, 1892, for the La Jolla and Rincon Reservations, and on July 10, 1910, for the San Pasqual Reservation. Thus, the relevant part of the statute is the latter part, which by its terms applies "[s]ubsequent to the issuance of any tribal patent." The language of the statute appears on its face to be comprehensive in prescribing the ways in which private parties can obtain rights-of-way for water projects across Mission Indian Reservations. Interior and the Bands contend that the statute means just what it appears to mean in this respect, and that it was not superseded, repealed, or limited by the congressional grant of licensing authority to the Commission under the FPA. The Commission contends, on the other hand, that § 8 of MIRA does not provide the exclusive means by which a private party can obtain such a right-of-way, or that if it does, it has been repealed implicitly to that extent by enactment of the FPA.

We begin analysis by considering the scope of MIRA as originally enacted. That question is illuminated by understanding the legal background from which MIRA emerged. Indian tribes generally possess sovereign power within their

reservations, including among other facets of self-government and territorial management the authority to control economic activity within their jurisdiction, and the power to exclude non-Indians from tribal lands. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137, 102 S.Ct. 894, 901, 71 L.Ed.2d 21 (1982). Similarly, it has long been held that a tribe's title to its lands cannot ordinarily be extinguished without tribal consent. See *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665, 99 S.Ct. 2529, 2536, 61 L.Ed.2d 153 (1979); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831).

Of course, the congressional power of eminent domain remains paramount, and can be exercised by Congress over tribal lands, just as it can be exercised over the lands of any private landowner within the jurisdiction of the United States. Congress can and often does delegate the power of eminent domain to various federal agencies. Ordinarily, however, it does not do so in the case of Indian lands; a special act of Congress is required when such lands are to be condemned. This point was highlighted recently when new regulations were proposed that would have given Interior the power to issue rights-of-way across certain tribal lands (not those involved in the instant case) without the Indians' consent. In commenting on these proposed regulations, the House Committee on Government Operations said:

Present law generally requires a special act of Congress to condemn tribal Indian land. If there are frequent instances of Indian tribes unreasonably refusing to consent to the Secretary's granting of rights-of-way over their land which are essential to the fulfillment of public purposes and the public welfare, then Congress might consider enacting legislation authorizing the person or agency seeking the right-of-way to institute a suit for condemnation thereof in a federal court.

H.R. Rep. No. 78, 91st Cong., 1st Sess. 9-10 (1969). With respect to the proposed regulations, the Committee said this:

The Committee believes that the Secretary's proposal for granting rights-of-way over tribal land without the consent of the tribe which owns it violates property rights, democratic principles, and the pattern of modern Indian legislation.

The Committee believes that the Secretary's assertion of power to act in disregard of his own regulation and issue rights-of-way over lands of tribes that have withheld their consent to such grants is contrary to law, as well as to good government, and should not be entertained.

Id. at 3-4.

These general principles are wholly consistent with Congress's purpose in including section 8 when it enacted MIRA, as the legislative origin of that section reveals. Shortly before the passage of MIRA, several irrigation companies sought rights-of-way across Indian land. Interior believed that the proposed irrigation ditches and flumes would benefit the Mission Indian Bands across whose lands they were to run. But Interior concluded that it was without power to grant the rights-of-way. That conclusion was based on an 1887 opinion of the Attorney General, which addressed the identical question. The Attorney General had said:

It is stated the diversion of the water and the right to dig the canal or ditch would be useful to the petitioners and beneficial in its effect to the Indians. These same facts exist in many cases where one man could use his neighbor's property with advantage both to himself and his neighbor; but still, as a rule, it is better to maintain the rights of property under the law.

Attorney-General Devens, in an opinion reported in 16 Opinions, page 553 (in which I concur), maintained

that the United States had power to grant such privileges as are asked for by the petitioner in this case; but the power to make the grant exists only in Congress, and without action by Congress it cannot be lawfully exercised.

18 Op. Att'y Gen. 563, 563-64 (1887).

In order to enable the Indians and the surrounding settlers to benefit from the construction of irrigation canals across reservation land, the Secretary of the Interior proposed that the pending legislation be amended to provide a mechanism for granting rights-of-way. The proposed amendment was identical to the later enacted section 8 except that it lacked the requirement that pre-patent grants guarantee a supply of water to the Indians for irrigation and domestic purposes. The proposed amendment was added to the bill as section 8 on the House floor. 22 Cong.Rec. 311-13 (1890). The Senate conferees agreed to the amendment with the addition of the requirement just mentioned, and with this modification, the bill enacting MIRA was passed.

The legislative history of section 8 makes clear that, at the time of its passage, Congress and Interior believed that federal agencies⁵ could not grant rights-of-way without specific authorization from Congress. In section 8, Congress carefully limited the scope of that authorization which it was willing to grant. Unless implicitly repealed by later legislation, section 8 represents the only way in which a private party may obtain a right-of-way across reservations created pursuant to MIRA.⁶

⁵Nor by the Indians themselves, since the United States held title to the lands. See 16 Op. Att'y. Gen. 552, 556-57 (1880).

⁶The Commission urges that section 8 of MIRA was not intended "to circumscribe the power of the United States, acting as sovereign, to dispose of public lands and reservations of the United States." We agree that it was not so intended. As we have explained, however, that sovereign power reposes in Congress, and may only be exercised by a federal agency to the extent of a specific congressional delegation. Section 8 of MIRA is thus not a limitation of the congressional power to dispose of reservation lands, but a carefully conditioned and circumscribed delegation of that power to Interior, and to the Bands themselves.

The Commission takes the position that section 29 of the FPA, 16 U.S.C. § 823 (1976), repeals section 8 of MIRA to whatever extent section 8 of MIRA comes into conflict with the Commission's asserted power to grant rights-of-way across reservations under its licensing authority. Section 29 provides, in pertinent part, that "[a]ll Acts or parts of Acts inconsistent with this Act are hereby repealed." However, the FPA explicitly requires the Commission, before issuing a license within any reservation, to find that "the licences will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." Section 4(e) of the FPA, 16 U.S.C. § 797(e) (1976). This requirement would be meaningless if Congress meant to extinguish preexisting Indian rights wherever they came into conflict with the Commissioner's comprehensive jurisdiction over power projects on federal lands. See *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Federal Power Comm'n*, 510 F.2d 198, 210-12 (D.C.Cir. 1975).

We do not agree with the Commission that section 8 of MIRA and the FPA conflict. Section 8 of MIRA defines the way in which any private entity can obtain a right-of-way across a reservation to which it applies. The FPA authorizes the Commission to issue licenses for the construction and operation of power projects. Where a project requiring a license under section 23(b) of the FPA crosses lands to which MIRA applies, the operator of that project is required both to obtain a license from the Commission, and to obtain the necessary right-of-way by the method provided in section 8 of MIRA.

Out of respect for Indian property rights, laws establishing and governing the reservations here involved were enacted.⁷

⁷When the Commission licenses a project crossing private lands, the licensee must obtain appropriate rights-of-way from the owners of those lands. This can be done by private negotiation or, failing that, through eminent domain. See section 21 of the FPA, 16 U.S.C. § 814 (1976). This simply recognizes that Congress did not intend to infringe property rights of private landowners in enacting the FPA. The property rights of Indian tribes within their reservations are of similar importance.

Without strong indications of congressional intent, we will not attribute to Congress a desire to abandon those principles, and repeal those laws, by enacting the FPA.

III. *The Rejection of Interior's Conditions.*

Section 4(e) of the FPA, 16 U.S.C. § 797(e), provides, in pertinent part, that

licenses issued within any reservation . . . shall be subject to and contain such conditions as the Secretary of the Department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.

Id. It is not disputed that, with respect to the reservation lands involved here, the "Secretary of the Department under whose supervision such reservation falls" is the Secretary of the Interior. Pursuant to this section, Interior proposed a number of conditions to be placed on the license granted by the Commission. Many of these proposed conditions were rejected or modified by the Commission. We thus confront the issue whether the Commission violated section 4(e) by issuing a license "within Indian reservations" that neither "contained" nor was "subject to" some of the conditions which Interior "deemed necessary for the adequate protection and utilization of the reservation."

The language of the statute appears quite plain on its face. The license "shall include and be subject to" such conditions as Interior "deems necessary." The Commission contends, however, that it is not bound to accept Interior's conditions because section 10(a) of the FPA imposes upon the Commission a duty to exercise its independent judgment as to what conditions are "best adapted to a comprehensive plan for improving or developing a waterway, . . . for the improvement and utilization of waterpower development, and for other beneficial public uses." Section 10(a) of the

FPA, 16 U.S.C. § 803(a) (1976). The Commission construed the word "shall" in section 4(e) as merely requiring the Commission to "give great weight to the judgments and proposals of" Interior. Opinion No. 36 at 108. The Commission also noted that Interior had propounded conditions which were "deemed necessary" for all six Mission Indian reservations in the San Luis Rey River watershed. The Commission reasoned that Project No. 176 only occupies the lands of three of the reservations, although it indirectly affects the other three by reducing the flow of the San Luis Rey River, which passes through one of them and recharges groundwater basins beneath the other two. The Commission held that the license was "within" only the three reservations upon whose lands the canal lies, and that it was only with respect to the protection and utilization of these three reservations that Interior was authorized and required by Section 4(e) to propound conditions. We disagree with both of the Commission's conclusions.

A. The Commission Must Accept Interior's Conditions.

The plain language of a statute controls its interpretation. *Maine v. Thiboutot*, 448 U.S. 1, 4, 9, 100 S.Ct. 2502, 2504, 2506, 65 L.Ed.2d 555 (1980). Because the relevant portion of section 4(e) is plain, our inquiry as to its meaning is at an end unless there is other statutory language in conflict with it. In particular, the Commission's vigorous historical argument cannot move us to ignore the fact that section 4(e) says, quite simply, that the license "shall include" the conditions which the Secretary "deems necessary."

The Commission also contends, however, that the apparently plain meaning of section 4(e) is at odds with the duty imposed on the Commission by section 10(a) of the Act. These two sections, however, can easily be harmonized. Section 10(a) generally gives the Commission au-

thority to modify proposed projects before approval, so that they will be "best adapted to a comprehensive plan" for the utilization of waterways and the development of power. Section 10(a) of the FPA, 16 U.S.C. § 803(a) (1976). In the case of a project within a reservation, once the Secretary of the Interior has propounded those conditions deemed necessary for the protection and utilization of the reservation, the Commission is free to modify the proposal in other ways, but not by altering or omitting Interior's conditions, to make it feasible and beneficial to the public. If this cannot be done, the Commission may decline to issue a license at all. The fact that section 4(e) limits the Commission's authority under section 10(a) certainly does not render the two sections inconsistent. To conclude, as does the Commission, that the broad general authorization of section 10(a) is not only inconsistent with, but also overrides, the plain, specific limitation of section 4(e) is to ignore the most elementary canons of statutory construction. *See MacEvoy Co. v. United States*, 322 U.S. 102, 107, 64 S.Ct. 890, 893, 88 L.Ed. 1163 (1944) ("However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the enactment.' ").

The Commission urges that giving section 4(e) its literal meaning will place in the hands of Interior an "unconditional veto power" over the licensing authority of the Commission, unless the Commission itself can review Interior's determination as to what conditions are necessary. We need not decide whether, if this contention were true, it would affect our view as to the meaning of section 4(e). For it is clear that no such "unconditional veto power" is involved here. First of all, any license issued by the Commission which includes conditions propounded by Interior will be subject to judicial review under section 313(b) of the FPA, 16 U.S.C. § 825(b). Secondly, any failure by the Secretary

of the Interior to conform to the statutory standard in proposing conditions pursuant to section 4(e) will be reviewable as a final agency action under the applicable provisions of the Administrative Procedures Act, 5 U.S.C. §§ 701-706 (1976). The spectre of an unconditional veto power, with which an appointed public official could frustrate the public policies underlying the FPA, is illusory.

For these reasons, we conclude that section 4(e) of the FPA requires the Commission to include in any license "within a reservation" those conditions which the Secretary "deems necessary for the protection and utilization" of that reservation.

B. Project No. 176 Is Within All Six Reservations.

Project No. 176 lies partially within the geographical boundaries of three of the six reservations. There is no dispute as to whether the license is "within" those three reservations for purposes of section 4(e). Water rights of the other three reservations, the Pala, Pauma, and Yuima reservations, may be affected by the project, as they lie below the project in the San Luis Rey River watershed. The issue is whether or not the license is "within" these three reservations.

Section 3(2) of the FPA, 16 U.S.C. § 796(2)(1976), defines "reservation" as it is used in the FPA:

"[R]eservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws

....

Id. There can be no serious question that the water rights of the Pala, Pauma and Yuima Bands appurtenant to the

San Luis Rey River are "reservations" within the meaning of this definition. First of all, water rights are interests in land:

A water right is generally considered to be real property or "land." As Wiel says, "the right to the flow and use of water being a right in a natural resource, is real estate." A water right is real property for purposes of determining title in a quiet-title action, a mortgage recording requirement, satisfying the statute of frauds, descent and inheritance, and taxation.

1 R. Clark, ed., *Waters and Water Rights* § 53.1 at 345 (1967) (footnotes omitted). See *Hill v. Newman*, 5 Cal. 445 (1855); 1 Wiel, *Water Rights in the Western States* § 283 (3d ed. 1911). See also *Arizona v. California*, 373 U.S. 546, 596-97, 83 S.Ct. 1468, 1495-1496, 10 L.Ed.2d 542; *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 334 (9th Cir. 1956), cert. denied, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957). The Bands' water rights are owned by the United States. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 809-10, 96 S.Ct. 1236, 1242-1243, 47 L.Ed.2d 483 (1976); section 3 of MIRA. The Bands' water rights are reserved from private appropriation under the public land laws. *Cappaert v. United States*, 426 U.S. 128, 138-39, 96 S.Ct. 2062, 2069-2070, 48 L.Ed.2d 523 (1976); *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908). Thus, the Bands's water rights possess all of the elements of reservations as defined in section 3(2) of the FPA.

The Commission draws our attention to the fact that section 4(e) applies to licenses issued *within* reservations. It must be conceded that the word "within" tends to paint a geographical picture in the mind of the reader, and its presence in the statute lends support to the Commission's narrower view of Interior's duty and authority under section

4(e). We are thus confronted with a possible ambiguity on the face of the statute.

“[S]tatutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.” *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 42, 63 L.Ed. 138 (1918), *quoted in Bryan v. Itasca County*, 426 U.S. 373, 392, 96 S.Ct. 2102, 2112, 48 L.Ed.2d 710 (1976). Although the FPA was not enacted primarily for the benefit of dependent Indian tribes, it is obvious that the ambiguous language of section 4(e) now under consideration was included by Congress for that precise purpose, and that the canon of statutory construction just mentioned should therefore apply to it. It is equally obvious from the plain language of the FPA that Congress intended to limit and circumscribe the broad authority granted to the Commission to issue licenses in the public interest, by requiring those licenses not to be detrimental to the interests of Indians on reservations. There is no guarantee, of course, that the tribal interests which the United States has a fiduciary duty to protect and defend will coincide with the interest of the public at large. A water and hydropower project might be vastly beneficial to the public in general, for instance, even though by inundating an entire reservation it might be utterly inimical to the interests of the Indians whose reservation is concerned. We find in the plain language of the FPA a policy to foster the development of water power projects in the public interest, to the extent, and only to the extent, that such can be done without abandoning the fiduciary duties owed by the United States to dependent Indian tribes.

A water project may occupy a geographical portion of an Indian reservation without impinging in any serious way on Indian interests—e.g., by crossing a corner of the reservation with a power line or an access lane. Conversely, a

project may turn a potentially useful reservation into a barren waste without ever crossing it in the geographical sense—e.g., by diverting the waters which would otherwise flow through or percolate under it. We will not attribute to Congress, on account of the mere presence in its enactment of one ambiguous word, the perverse and illogical intention of guarding carefully against the former danger while openly embracing the latter. It is the necessary implication of the Commission's narrow construction of section 4(e) that Congress had just such an intent.

For all these reasons, we are compelled to reject the Commission's conclusion that its duties under section 4(e), including the duty to accept the Secretary of the Interior's proposed conditions, and its duty to make findings as to whether the license is consistent with the reservations' purpose, apply to only the La Jolla, Rincon, and San Pasqual reservations. We hold, rather, that those duties exist also with respect to the Pala, Pauma, and Yuima Reservations.

CONCLUSION

Because the Commission has erred in its construction and application of section 4(e) of the FPA in this matter, a remand for further consideration is necessary. Interior's proposed conditions will have to receive a different treatment, consistent with the conclusions expressed in this opinion, in any further proceedings. Furthermore, as we have explained, no license issued by the Commission will, in and of itself, give any licensee a right-of-way across any reservation created pursuant to MIRA. We decline to overrule the Commission's conclusion that the licensing of Project No. 176 is within its statutory jurisdiction.

A number of other issues were presented in the petition for review in this matter. In view of our conclusions ex-

pressed above, it would be inappropriate for us to reach those issues at this point in the proceedings.

REVERSED AND REMANDED.

**Escondido Mutual Water Co. vs.
Federal Energy Regulatory Commission,
701 F.2d 826 (9th Cir. 1983).**

Escondido Mutual Water Company, City of Escondido, and Vista Irrigation District, Petitioners, v. Federal Energy Regulatory Commission, Respondent, San Pasqual Band of Mission Indians, Secretary of Interior, etc., et al., Intervenor.

San Pasqual, La Jolla, Rincon, Pauma and Pala Bands of Mission Indians, Petitioners, v. Federal Energy Regulatory Commission, Respondent, Escondido Mutual Water Company, City of Escondido and Vista Irrigation District, Intervenor.

The Secretary of the Interior, acting in his capacity as trustee for the Rincon, La Jolla and San Pasqual Bands of Mission Indians, Petitioner, v. Federal Energy Regulatory Commission, Respondent, Escondido Mutual Water Company, City of Escondido and Vista Irrigation District, Intervenor.

Nos. 79-7625, 80-7012 and 80-7110.

United States Court of Appeals, Ninth Circuit. March 17, 1983.

Paul D. Engstrand, Leroy A. Wright, San Diego, Cal., James C. Kilbourne, Washington, D.C., Robert S. Pelcyger, Boulder, Colo., argued, for petitioners; Jennings, Engstrand & Henrikson, Glenn, Wright, Jacobs & Schell, San Diego, Cal., C. Emerson Duncan, II, Duncan, Allen & Mitchell, Washington, D.C., on brief, for Escondido; Fredericks & Pelcyger, Boulder, Colo., on brief, for San Pasqual, etc.

Joseph S. Davies, Jr., Joshua Rokach, FERC, Washington, D.C., argued, for respondent; John A. Cameron, Acting Asst., Sol., Kristina Nygaard, FERC, Washington, D.C., on brief.

ORDER on PETITIONS FOR REHEARING

Before ANDERSON, FERGUSON and NELSON, Circuit Judges.

In these consolidated cases, petitions have been filed as follows:

1. A petition for rehearing and a suggestion for rehearing en banc filed December 20, 1982 by the Escondido Mutual Water Company, City of Escondido and Vista Irrigation District;
2. A petition for rehearing filed December 20, 1982 by the Secretary of the Interior;
3. A petition for rehearing filed December 16, 1982 by the San Pasqual, La Jolla, Rincon, Pauma and Pala Bands of Mission Indians;
4. A petition for rehearing filed December 23, 1982 by the Federal Energy Regulatory Commission.

In response to the petition for rehearing by the Federal Energy Regulatory Commission, the language in the panel opinion of November 2, 1982, in the middle of the first column of 5123 of the slip opinion, 692 F.2d 1223 at p. 1235, which states as follows:

First of all, any license issued by the Commission which includes conditions propounded by Interior will be subject to judicial review under section 313(b) of the FPA, 16 U.S.C. § 8251(b). Secondly, any failure by the Secretary of the Interior to conform to the statutory standard in proposing conditions pursuant to section 4(e) will be reviewable as a final agency action under the applicable provisions of the Administrative Procedures Act, 5 U.S.C. §§ 701-706 (1976). The spectre of an unconditional veto power, with which an appointed public official could frustrate the public policies underlying the FPA, is illusory.

has been amended to read as follows:

Any license issued by the Commission which includes conditions propounded by Interior will be subject to judicial review under section 313(b) of the FPA, 16 U.S.C. § 825/(b). The spectre of an unconditional veto power, with which an appointed public official could frustrate the public policies underlying the FPA, is illusory.

With that amendment to the opinion, Judges Ferguson and Nelson have voted to deny all the petitions for rehearing and to reject the suggestion for rehearing en banc.

Attached hereto is a statement of Judge Anderson. Judge Anderson would grant and deny the various petitions for rehearing as stated in his concurring and dissenting statement.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R.App.P. 35.

The petitions for rehearing are denied and the suggestion for a rehearing en banc is rejected.

J. BLAINE ANDERSON, Circuit Judge, concurring and dissenting:

I concur in denial of the petitions for rehearing filed by the Secretary of Interior and the San Pasqual, La Jolla, Rincon, Pauma and Pala Bands of Mission Indians ("Bands"). For the following reasons, however, I dissent from denial of the petitions for rehearing filed by Escondido Mutual Water Company, City of Escondido, Vista Irrigation District ("Licensees"), and the Federal Energy Regulatory Commission ("FERC"). Except for the reservations expressed below, I continue to concur in the majority opinion.

I. INDIAN CONSENT

A. *Mission Indian Relief Act*

Petitioners persuasively argue that our opinion misinterprets § 8 of the Mission Indian Relief Act ("MIRA"). 26 Stat. 712 (1891). Section 8 provides in pertinent part:

Subsequent to the issuance of any tribal patent, . . . any citizen of the United States, firm, or corporations may contract with the tribe, band, . . . for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose.

We interpreted § 8 as the exclusive means by which a private party may obtain a right-of-way across reservations created pursuant to MIRA. *Escondido Mutual Water Co. v. Federal Energy Regulatory Commission*, 692 F.2d 1223, 1231-34 (9th Cir.1982). Our interpretation necessarily implies that the Bands, by withholding consent, can completely bar the licensing of a federal power project. Our interpretation further provides no recourse to the proposed licensee if Indian consent is arbitrarily or improvidently withheld. Upon reconsideration, I believe our interpretation of § 8 conflicts with the Federal Power Act's ("FPA") pervasive scheme for obtaining rights-of-way over tribal lands.

The opinion relies heavily on legislative history which I believe is rather weak support for our sweeping holding. The 1969 House Committee Report, 692 F.2d at 1232, says nothing more than that a federal agency exceeds its authority if it grants rights-of-way without congressional delegation. The 1887 Attorney General opinion, *id.* at 1232-33, is merely an example of that proposition; an administrative agency (Interior) to whom Congress had not delegated power to grant rights-of-way. That opinion may have led to MIRA § 8, but the legislative history bears no indication that Congress intended § 8 as the exclusive means of obtaining rights-of-way. In 1891, perhaps contractual negotiation was the only means thought necessary to obtain rights-of-way from Mission Indians, especially given that the Attorney General

opinion addressed a water project concededly beneficial to the Indians. More probably, however, Congress simply gave no thought to the eminent domain matter; contractual negotiation resolved the immediate problem.

A farther-sighted Congress subsequently enacted the FPA. In it, Congress recognized that contractual means may sometimes fail to obtain rights-of-way necessary to a federal power project. Section 21, for example, provides an alternative to the contractual process by delegating to licensees of federal power projects the power of eminent domain. FPA § 21, 16 U.S.C. § 814. Though that condemnation power is inapplicable to reservations held in trust by the United States, § 21, may be applied to Indian lands held in fee. *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960).¹

The FPA employs a different and much more protective scheme for acquiring the use of tribal lands within Indian reservations. Unlike privately owned property which may be utilized as required, FERC, under FPA § 4(e), 16 U.S.C. § 797(e), may license the use of tribal lands within an Indian reservation only upon a finding "that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." Even then, the license is subject to terms and conditions which the Secretary of Interior shall deem necessary for the adequate protection and utilization of the reservation. *Id.*

Moreover, unlike privately owned property which a licensee may condemn outright under § 21, tribal lands within an Indian reservation may be used only upon payment of

¹In *Tuscarora*, the Supreme Court recognized that to subject trust reservation land to condemnation would amount to the sovereign condemning its own property. 362 U.S. at 113-14, 80 S.Ct. at 551-52, 4 L.Ed.2d at 594-95.

an annual rental charge. FPA § 10(e), 16 U.S.C. § 803(e). The rental charge is subject to approval "of the Indian tribe having jurisdiction of such lands" as provided in § 16, 25 U.S.C. § 476, of the Indian Reorganization Act. I believe Congress intended FPA §§ 4(e) and 10(e) to be the counterparts in the tribal land sector to FPA § 21 in the private land sector.

The majority acknowledges that Congress may exercise the condemnation power over tribal lands and may pass legislation delegating to a person or agency seeking a right-of-way that condemnation power. 692 F.2d at 1232. The majority and I disagree on the extent to which such an act of Congress must refer specifically to Indians. *Tuscarora* teaches that meticulous specificity is unnecessary. In responding to the Tribe's argument that § 21 of the FPA could not apply to Indian lands because it did not specifically mention them, the Court observed, "it is well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." 362 U.S. at 116, 80 S.Ct. at 553, 4 L.Ed.2d at 596.

Even if a special act of Congress is necessary, I cannot conceive of a more direct and specially-tailored scheme for appropriation of Indian lands than the FPA. *Tuscarora*, although addressing the somewhat novel issue of Indian lands held in fee, says as much:

The Federal Power Act constitutes a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission and utilization of electric power in any of the streams or other bodies of water over which Congress has jurisdiction under its commerce powers, and upon the public lands and reservations of the United States under its property powers. See § 4(e). It neither over-

looks nor excludes Indians or lands owned or occupied by them. Instead, as has been shown, the Act specifically defines and treats with lands occupied by Indians — “tribal lands embraced within Indian reservations.” See §§ 3(2) and (10)(e). The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians.

362 U.S. at 118, 80 S.Ct. at 554, 4 L.Ed.2d at 597.

Legislative history of the FPA is also at odds with our opinion. In 1920, an amendment to the Water-Power bill (the FPA's predecessor) was proposed that would prohibit the issuance of any license affecting tribal lands within Indian reservations, except by and with consent of the tribal council. The Senate conferees rejected the amendment, seeing “no reason why water-power use should be singled out from all other uses of Indian reservation land for special action of the council of the tribe.” H.R.Rep. No. 910, 66th Cong., 2d Sess. 8 (1920). In the face of this compelling legislative history, and upon reconsideration of the FPA's many provisions addressed directly to Indians, I can no longer adhere to our prior conclusion that MIRA § 8 is the exclusive means by which rights-of-way for FPA licensed projects over Mission Indian land can be obtained.

B. Indian Reorganization Act

Section 16 of the Indian Reorganization Act (“IRA”), 25 U.S.C. § 476, contains a sweeping provision pertaining to Indian property rights:

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in land, or other tribal assets without

the consent of the tribe; and to negotiate with the Federal, State, and local Governments.

In order for an Indian tribe to enjoy the powers and benefits conferred by § 16, it must organize and operate under a constitution that is "ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation . . ." *Id.* The constitution must then be approved by the Secretary of the Interior. *Id.* Because the San Pasqual Band adopted a constitution pursuant to IRA, we must decide whether § 16 prevents an FPA licensee from obtaining rights-of-way absent Indian consent. I would hold it does not.

The purposes of IRA § 16 were twofold. First, the section was designed to encourage Indians to revitalize their self-government by establishing a basis for the adoption of tribal constitutions. *Fisher v. District Court*, 424 U.S. 382, 387, 96 S.Ct. 943, 946, 47 L.Ed.2d 106, 111 (1976); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152-52, 93 S.Ct. 1267, 1272-73, 36 L.Ed.2d 114, 120-21 (1973). Second, the section was one important element of an overall statutory scheme designed to put an end to piecemeal legislation authorizing sale of Indian lands and to allotment of tribal lands to individual members of a tribe. 78 Cong.Rec. 11123. See F. Cohen, *Handbook of Federal Indian Law* 516-17 (1982 ed.). The legislative history does not reveal Congress' intent, in enacting IRA § 16, to supplant the federal government's power to dispose of or reclassify the use of its own property. As Cohen concludes, "Congressional power to extinguish Indian ownership by plain and specific legislation is plenary, so long as Congress compensates the tribes for the abrogation of recognized title as required by the Fifth Amendment." *Id.* at 517. For the same reasons as discussed in the preceding section under MIRA, I conclude that § 16 of IRA is not the exclusive means for ob-

taining rights-of-way by FPA licensees.

Certainly, contractual negotiation and agreement of the parties is the preferred method of acquiring rights-of-way across Indian lands. But failing consent, I believe §§ 3(2), 4(e), and 10(e) of the FPA are express congressional authority for acquiring such property. Substantial protections for existing Indian property rights are built into FPA § 4(e), which requires that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." The majority recognized that after imposing certain conditions regarding delivery of water, FERC made the § 4(e) finding. 692 F.2d at 1228. I would grant the Licensees' and FERC's petition for rehearing, and on rehearing, I would focus specifically on the definition of reservation "purpose" and the extent to which FERC's § 4(e) finding was supported by substantial evidence and I would so find and affirm. *Cf. Note, Tribal Consent and the Lease of Indian Lands for Federal Power Projects*, 59 Minn.L.Rev. 385, 416-19 (1974) (suggesting a broad definition of reservation "purpose").

II. INTERIOR'S CONDITIONS

As previously indicated, § 4(e) of the FPA provides that licenses issued within any reservation are subject to those terms and conditions which the Secretary of Interior deems necessary for the adequate protection and utilization of the reservation. 16 U.S.C. § 797(e). Holding these conditions mandatory on FERC, our opinion reasons that § 4(e) does not vest Interior with an "unconditional veto power" over FERC's licensing authority because (1) licensing proceedings are subject to judicial review in the court of appeals, and (2) conditions imposed by Interior are final agency action under the Administrative Procedure Act reviewable in the district court. 692 F.2d at 1235.

Disregarding for the moment our conclusion that judicial review minifies the veto power, our reasoning was unsound. Section 313(b) of the FPA, 16 U.S.C. § 825l(b), vests exclusive jurisdiction in federal courts of appeal to determine on review of a licensing proceeding whether statutory standards have been satisfied. *City of Tacoma v. Taxpayers*, 357 U.S. 320, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958). Conditions imposed by Interior under § 4(e) must necessarily be among those reviewable standards because they constitute an integral part of the final licensing decision. It was not the intent of Congress to fragment review of a final FPC order from review of a secretary's statutory duties under the FPA. See *State of North Carolina v. Federal Power Commission*, 393 F.Supp. 1116 (M.D.N.C. 1975) (action to enjoin FPA licensee pending the Secretary of Interior's finding that the license would not adversely impact a waterway designated under the Wild and Scenic Rivers Act; the district court dismissed, citing FPA § 313(b) as the exclusive avenue for review). Such bifurcation of review conflicts with the law of this circuit, that "Congress may select the forum in which review may be had and special statutory review procedures take precedence over whatever nonstatutory review might otherwise be available in the district court." *Nevada Airlines, Inc. v. Bond*, 622 F.2d 1017, 1020 (9th Cir. 1980); *UMC Industries, Inc. v. Seaborg*, 439 F.2d 953, 955 (9th Cir. 1971).

In light of the foregoing precedent, I join in modification of this portion of the opinion on denial of rehearing. The larger issue, however, is whether our conclusion — that conditions imposed by Interior under § 4(e) are mandatory on FERC — should remain intact.

All parties agree the Secretary may not fix conditions impossible of fulfillment and thus block the use of all tribal land. His determinations are tested by reasonableness; that

is, he may impose conditions *reasonably* deemed "necessary for the adequate protection and utilization of such reservation." I agree conditions imposed by the Secretary are mandatory on FERC to the extent they are reasonable; the crucial issue is which forum — the Secretary of Interior, FERC, or the reviewing court — is to decide reasonableness.

I would place the initial reasonableness decision on FERC, for it is, after all, the forum in which the initial factfinding function is vested. FPA § 4, 16 U.S.C. § 797. *See Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 620 (2d Cir.), *cert. denied*, 384 U.S. 941, 86 S.Ct. 1462, 16 L.Ed.2d 540 (1965) ("The Commission has an affirmative duty to inquire into and consider" all facts relevant to the decisionmaking standards imposed by the statutory scheme.). FERC's written findings of fact and supporting reasoning would then be subject to review in the court of appeals. I believe this procedure would preserve the control of FERC over licensing, and at the same time respect the Secretary's statutory duty to protect the reservations. I would, therefore, conclude that the FERC properly interpreted and applied § 4(e) and that all of its findings in that regard are supported by substantial evidence.

I would also sustain the FERC's findings and conclusions denying a retroactive remedy for annual charges to 1924. These are damages traditionally awarded by a court for unlawful trespass. The FERC has no statutory or common law authority to consider and assess damages in this case. It was correct in so holding.

Federal Energy Regulatory Commission

Opinion No. 36

Issued February 26, 1979.

United States of America Federal Energy Regulatory Commission.

Before Commissioners: Charles B. Curtis, Chairman; Don S. Smith, Georgiana Sheldon, Matthew Holden, Jr., and George R. Hall.

Escondido Mutual Water Company; City of Escondido, California; and Vista Irrigation District¹. Project No. 176; Docket No. E-7562.

Secretary of the Interior Acting in His Capacity as Trustee for the Rincon, La Jolla and San Pasqual Bands of Mission Indians v. Escondido Mutual Water Company and City of Escondido, California; Vista Irrigation District; San Diego Gas & Electric Company. Docket No. E-7655; Project No. 559.

OPINION NO. 36

**OPINION AND ORDER ISSUING NEW LICENSES,
DETERMINING ANNUAL CHARGES FOR PAST
PERIODS, PROHIBITING CERTAIN ACTIVITIES,
CONDITIONALLY PROVIDING INTERIM
OPERATING PROCEDURES AND TERMINATING
COMPLAINT AND INVESTIGATORY PROCEEDINGS
(Issued February 26, 1979)**

APPEARANCES

H. Gregory Austin, Reid Peyton Chambers, Harold A. Ranquist, Charles E. O'Connell and Earle D. Goss on behalf of the Secretary of the Interior

¹The caption is enlarged in view of the addition herein of new licensees.

Arthur J. Gajarsa on behalf of the San Pasqual Band of Mission Indians

Robert S. Pelcyger, L. Graeme Bell, III, Barbara Fix, Bruce R. Green, Don B. Miller, Barbara E. Karshmer and Terry L. Singleton on behalf of the Rincon, Pala, Pauma, La Jolla Bands of Mission Indians; also *Donald L. Scoville* for the Pala Band

Robert L. Woods on behalf of the Staff of the Federal Power Commission

Paul D. Engstrand, Jr., Donald R. Lincoln and C. Emerson Duncan, II on behalf of the City of Escondido, California, and Escondido Mutual Water Company

Leroy A. Wright on behalf of Vista Irrigation District

Denis Smaage on behalf of California Department of Fish and Game

Vincent P. Master, Jr. on behalf of the San Diego Gas & Electric Company

James A. Burke on behalf of Uhllein Hansen

AN OVERVIEW

In the 1890's Escondido Irrigation District constructed a conduit within San Diego County, California, to carry water for domestic and irrigation use from the San Luis Rey River, through the surrounding mountains and out of the river's watershed to the City of Escondido (Escondido). In 1915 and 1916 Escondido Irrigation District's successor, Escondido Mutual Water Company (Mutual), installed facilities to utilize the water to generate electric power at two locations along that man-made waterway.

Because of those generating facilities, Mutual, in 1921, applied under the Federal Water Power Act of 1920 for a license which would include that portion of its overall water and water power project which extended from the point of

diversion of the San Luis Rey waters into the conduit, to the point of discharge of some of those waters through the tailrace of the second powerhouse along that waterway, known as Bear Valley powerhouse. The Federal Power Commission, in its records, designated that portion of Mutual's overall project as its Project No. 176. Mutual amended its application in 1924, and promptly thereafter the Commission² issued a 50-year license authorizing Mutual to construct³, operate and maintain the facilities or works of Project No. 176.⁴ Although the license expired on June 24, 1974, Mutual has continued to operate and maintain the project under annual licenses issued pursuant to Section 15(a) of the Federal Power Act.⁵

The consolidated proceeding designated by the captioned dockets includes a joint application of Mutual and Escondido⁶ for a new 50-year license for Project No. 176 and a competing application of five Bands of Mission Indians (Bands)⁷

²The term "Commission" refers to the Federal Power Commission in contexts prior to October 1, 1977, and to the Federal Energy Regulatory Commission in contexts on and after that date. See Sections 402(a)(2) and 705(b) of the Department of Energy Organization Act, 42 U.S.C. §§ 717(a)(2) and 7295(b), and the joint regulation entitled "Transfer of Proceedings to the Secretary of Energy and the Federal Energy Regulatory Commission", 10 CFR § . . .

³The dam at an impoundment downstream from the conduit which is now known as Lake Wohlford was then being reconstructed and elevated in height.

⁴See Appendix A which shows the principal places and facilities discussed herein.

⁵The Federal Water Power Act was reenacted in 1935 as Part I of the Federal Power Act.

⁶Escondido acquired approximately 90% voting control of Mutual in 1970 and proposes to combine its water distribution system with Mutual's water conveyance system as soon as it may lawfully do so.

⁷The Bands consist of the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians. Mutual's conduit diverts the San Luis Rey waters within the La Jolla Indian Reservation and occupies portions of that reservation and the Rincon Indian Reservation, both of which are wholly within the watershed of that river; the San Pasqual Indian Reservation, which is partly within that watershed; and other Federal lands. The Pala and Pauma (including for all purposes of this proceeding the Yuima) Indian Reservations are also within that watershed downstream from the diversion point on the La Jolla Indian Reservation.

for a nonpower license under Section 15(b) of the Federal Power Act.⁸ Although the Secretary of the Interior (Interior) supports the Bands' application for a nonpower license, Interior advocated initially and now advocates alternatively that the United States take over, or "recapture", part of the project pursuant to Section 14 of the Federal Power Act.⁹

Docket No. E-7562 within this consolidated proceeding involves a 1970 complaint against Mutual and Escondido in which Interior charged on behalf of the La Jolla, Rincon and San Pasqual Bands¹⁰ that Mutual violated its license, and requested injunctive relief, damages, revocation of the license and a retroactive redetermination and assessment of the annual charges of \$25. Docket No. E-7655 is a 1971

⁸Section 15(b) provides, in pertinent part,

"[T]he Commission, on its own motion or upon application . . . after notice to each State commission and licensee affected, and after opportunity for hearing, whenever it finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licensed project should no longer be used or adapted for use for power purposes, may license all or any part of the project works for nonpower use. . . . Any license for nonpower use shall be a temporary license. Whenever, in the judgment of the Commission, a State, municipality, interstate agency, or another Federal agency is authorized and willing to assume regulatory supervision of the lands and facilities included under the nonpower license and does so, the Commission shall thereupon terminate the license. . . ."

⁹Section 14 provides, in pertinent part,

"(a) Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain any project or projects . . . covered in whole or in part by the license. . . .

"(b) . . . In any relicensing proceeding before the Commission any Federal department or agency may timely recommend . . . that the United States exercise its right to take over any project or projects. Thereafter, the Commission, if it does not itself recommend such action . . . shall upon motion of such department or agency stay the effective date of any order issuing a license . . . for two years after the date of issuance of such order. . . ."

¹⁰As noted, Mutual's conduit occupies portions of the reservations of the particular Bands.

investigation under Section 4(g) of the Federal Power Act¹¹, among other provisions, into the possible unlawful joint use and control of the works of Project No. 176 by Vista Irrigation District (Vista), which owns and operates Lake Henshaw, the only impoundment on the San Luis Rey River, located nine miles upstream from Mutual's diversion point. And Project No. 559 involves a non-controversial application of San Diego Gas & Electric Company (SDG&E) for a new license for a 2.4-mile primary transmission line running from the first powerhouse along the conduit, known as the Rincon powerhouse, to a point of interconnection with SDG&E's distribution system.

Subject to a possible two year stay of the effective date of a new license mandated by Section 14(b) of the Federal Power Act, we are issuing a 30-year license to Mutual, Escondido and Vista¹² to operate and maintain Project No. 176, including Vista's Henshaw Dam, Lake Henshaw and the related lands, facilities and water rights. Furthermore, we are prohibiting modifications to Henshaw Dam and appurtenant facilities pending our further order, and are providing for water to the La Jolla, Rincon and San Pasqual

¹¹Section 4 provides, in pertinent part,

"The Commission is hereby authorized and empowered—

* * *

"(g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, state or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water power resources of the region."

¹²Although Vista has not filed an application to become a joint licensee of Project No. 176 with Mutual and Escondido, Vista has indicated its willingness to accept such a status, and neither Mutual nor Escondido has indicated any opposition.

Bands in the event of a stay of the effective date of the new license. We are also issuing a 30-year license to SDG&E to continue to operate and maintain its Project No. 559 transmission line, and amending Mutual's 1924 license for Project No. 176 to fix and readjust annual charges.

GEOGRAPHIC, HISTORIC AND PROCEDURAL HIGHLIGHTS

Geographic

The San Luis Rey River is a non-navigable¹³ waterway which rises in mountainous terrain in northern San Diego County, California, and flows in a westerly direction some 65 miles into the Pacific Ocean. Its watershed occupies an area of approximately 565 square miles, of which 203 square miles lie upstream from Henshaw Dam and 32 square miles lie between Henshaw Dam and the point of diversion into the conduit.

The San Luis Rey watershed is characterized as semi-arid and has an average annual rainfall of 21 inches at Henshaw Dam. Nearby, Escondido has an average annual rainfall of 16 inches and Vista, only 13 inches. The rainfall throughout the watershed and in nearby areas is heaviest from November through April and virtually nonexistent during June, July, August and September. As a result of these and other conditions the river's flow is sporadic and intermittent, and it is normally dry for several months of the year.

Lake Henshaw is a shallow reservoir which experiences a high degree of evaporation¹⁴ as a combined result of climatic conditions and the fact that it has a large surface area in relation to its depth. While it is the only surface water

¹³It is so stipulated and, therefore, no issues of navigability are involved herein.

¹⁴Lake Henshaw experienced an evaporation loss of 36.8% during its first 51 years of operation.

impoundment on the San Luis Rey River, three ground water basins lie under the river in the area under consideration: The Warner Basin underlies Lake Henshaw and its headwaters, and has been pumped since 1950 to augment the natural flows into Lake Henshaw. Downstream, the Pauma Basin underlies the Rincon and Pauma Indian Reservations and is separated by the Pauma Narrows, which is an impermeable formation, from the Pala Basin. The latter underlies the Pala Indian Reservation and extends westward to the Monserate Narrows. All of the ground water basins are recharged through rainfall and seepage from the river flows and irrigation.

Although in the past up to 200 acres of the La Jolla Indian Reservation have been irrigated from tributaries of the San Luis Rey River, that 8,332 acre reservation has never been irrigated from the river itself. And in recent years, less than 15 acres have generally been under irrigation. On the other hand, the San Luis Rey River upstream from Mutual's intake is utilized by the La Jolla Band and others as a recreational fishery, where the La Jolla Band maintains two campgrounds. Because the river normally is dry during the summer, its use as a fishery is enhanced by continuous releases of stored and/or pumped water from Lake Henshaw.

Prior to 1913 the Rincon Band irrigated their reservation by means of ditches from the San Luis Rey River. Between 1913 and 1916 Interior constructed irrigation facilities consisting of pipelines and wells on the Rincon Indian Reservation, and in the latter year Mutual completed the installation of its Rincon powerhouse. The Rincon Band was thereby provided water through the Rincon tailrace and/or electric power to operate irrigation wells for 575 acres of their 4,057 acre reservation. A pipeline from the tailrace crossed the San Luis Rey River to a booster pump which made the water available to all irrigable parts of the res-

ervation. But the pipeline deteriorated and is now used to convey water across the river to irrigate lower lying lands or to discharge the water into the river and/or its tributaries where the flows percolate into the Pauma Basin. In recent years, not more than 200 acres of the Rincon Indian Reservation have been under cultivation.

The San Pasqual Indian Reservation obtains water for domestic purposes from Valley Center Municipal Water District or from private wells. There is no irrigated farming on the 1,380 acre reservation, and it does not receive water from the San Luis Rey River or the Escondido Canal.¹⁵

Historic

In the early 1890's Escondido Irrigation District and the Rincon Band of Mission Indians filed certain notices under California law to appropriate water from the San Luis Rey River. Thereafter, Escondido Irrigation District was granted a right-of-way for its proposed conduit¹⁶ under the terms of a purported agreement dated June 4, 1894, with Interior acting on behalf of the La Jolla Band of Mission Indians, in which Escondido Irrigation District agreed to

“furnish at its own expense and at such places or points along said flume or canal within said reservation and within the Rincon reservation and at and during such times and periods of time as the Indians on said res-

¹⁵Some residents along the conduit siphon water through garden and similar hoses.

¹⁶The right-of-way appears to have been limited to the La Jolla Indian Reservation. Apparently, Escondido was granted a right-of-way through the Rincon Indian Reservation under the terms of a similar agreement dated March 19, 1897, which was found to be defective in its execution and/or detrimental to the Indians. There is no right-of-way agreement, as such, through the San Pasqual Indian Reservation since the trust patent for that reservation was not issued until 1910. In any event, Interior apparently granted a right-of-way across all three reservations in or about 1910.

ervations may desire . . . an ample supply and quantity of water for the use of said Indians for agricultural and for domestic purpose and for stock belonging to said Indians."¹⁷

As the conduit was originally constructed, water was diverted through a small tunnel in one bank of the river¹⁸ and flowed almost 15 miles by gravity through a series of wooden flumes (some of which were hung by cables from bluffs) and earthen canals which were cut into and wound their way through the mountains, into a small creek and then a reservoir which are now known as Bear Valley Creek and Lake Wohlford, and then on to Escondido. The conduit came to be known as the Escondido Canal, and portions were reconstructed from time to time so that it is now 13.5 miles long and consists of a 112-foot long concrete diversion dam with a 16-foot crest, and a series of tunnels, metal flumes, concrete canals and a 2,156-foot long 42-inch pipe known as Hellhole Siphon.¹⁹ The Escondido Canal right-of-way occupies the following lands:²⁰

¹⁷The purported agreement also provides,

"That the right to the free use of a sufficient quantity of water from the flume or canal of said company as hereinbefore stipulated shall continue and be in force so long as the Indians shall reside upon the said reservations. . . ."

¹⁸The diversion was assisted in periods of low flow by temporary dams of rock, gravel and brush which were washed away by the next high flow.

¹⁹Hellhole Siphon replaced a section of the Escondido Canal in the vicinity of Hellhole Creek and operates as an inverted siphon by dropping the water down the side of a mountain and carrying it across a valley and up the side of another mountain to a point on the Escondido Canal which is 15 feet below the point of the drop.

²⁰The figures are those proposed in Mutual's application for a new license and exceed those under Mutual's current license by about 100 acres. They include acreage occupied by the conduit, access trails and roads, telephone lines, intake works, a caretaker's area and the works associated with the Rincon powerhouse.

La Jolla Indian Reservation	— 24.65 acres
Rincon Indian Reservation	— 26.56 acres
San Pasqual Indian Reservation	— 36.18 acres
Indian Subtotal	— 87.39 acres
Other United States lands	— 225.08 acres
United States Subtotal	— 312.47 acres
Private lands	— 43.85 acres
Escondido Canal Total	— 356.32 acres

And Lake Wohlford occupies an additional 843 acres (of which 181 acres are United States lands), bringing the total acreage of Project No. 176 to 1,199.32.

The Escondido Canal was placed into operation in 1895. A decade later Escondido Irrigation District failed, and Mutual was organized in 1905 to succeed to its interests.²¹

Beginning in 1911, William G. Henshaw (Henshaw) posted notices under California law to impound the headwaters of the San Luis Rey River within Warner's Ranch²²,

²¹Mutual's Articles of Incorporation state that it was formed "To supply . . . water for any or all beneficial uses; secondarily and incidentally, to develop water power and to apply the same to the generation of electric power for any and all beneficial uses . . ."

²²Title to the 43,402 acre Warner's Ranch (or Warner Ranch, as it is sometimes called) originates in a Mexican grant and was upheld against claims of prior occupancy by Mission Indians in *Harvey v. Barker*, 126 Cal. 262 (1899), affirmed, *Barker v. Harvey*, 181 U.S. 481 (1901), wherein the Supreme Court said, 181 U.S., at page 491,

"There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by an action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its power of disposal."

In or about 1904 the Mission Indians who were removed from Warner's Ranch were settled in or near the Pala Indian Reservation.

Barker was described in *United States v. Title Insurance and Trust Company*, 265 U.S. 472 (1924), as a "rule of property" deciding title issues which "should no longer be considered open."

which he owned, and to divert the waters so impounded. On June 21, 1912, Mutual and Henshaw entered into an agreement under which Mutual consented to the construction and maintenance of a dam across the San Luis Rey River on Warner's Ranch, and the consequent impoundment and diversion of San Luis Rey waters, and Henshaw agreed that Mutual was entitled to receive an annual flow of 4,143 acre-feet at the intake of the Escondido Canal consisting of the sum of (a) the natural inflows between the proposed dam and the intake, and (b) any amounts which would have to be released from the proposed dam from November 1 through July 1 each year to bring those inflows up to the lesser of (i) 4,143 acre-feet, or (ii) the natural flow at the intake without the proposed dam.²³

On February 2, 1914, Mutual entered into a purported agreement with Interior acting on behalf of the Rincon Band of Mission Indians which modified the purported agreement of June 4, 1894, insofar as it pertained to the Rincon Band, authorized the construction of a power plant on the Rincon Indian Reservation, and provides,

"It is mutually understood and agreed that the Rincon Indians herein mentioned are entitled to the flow of the San Luis Rey River up to a maximum of six cubic feet per second.

"It is further mutually understood and agreed that the United States, for and on behalf of said Rincon Indians, has reserved for their use and disposition, and shall reserve for their use and disposition, in any agreement relating to the water flowing or to flow in the San Luis Rey river, a minimum flow of six cubic feet of water per second of time, measured at or near the intake of

²³According to a 1922 report to the Federal Power Commission, Mutual diverted an average of 4,344 acre-feet of water from 1896-97 through 1920-21.

the canal of the Escondido Mutual Water Company, and, in extremely dry years, a minimum flow of three cubic feet of water per second of time for the months of July, August, and September of each such extremely dry year. The flow of water so reserved shall be carried in the ditch of the Escondido Mutual Water Company and delivered by said Company to said Indians at the power plant to be constructed . . . and any water not needed or to be needed by said Indians shall be subject to the use and disposition of the Escondido Mutual Water Company for any purpose whatsoever. . . ."

The purported agreement provides, additionally, for rights-of-way and for selling electric power to the Rincon Band,

"said current to be constantly available whenever required for pumping water, so that when the pumped water is added to the water which passes through the power plant, said Indians will have all the water needed for their use, not to exceed six cubic feet per second. . . ."

Mutual completed the construction of its Bear Valley powerhouse in 1915, installing two 120 KW generators under an operating head of approximately 400 feet²⁴, and its Rincon powerhouse in 1916, installing two 120 KW generators under an operating head of about 800 feet²⁵, and began serving electric power.²⁶ The Federal Water Power Act was enacted in 1920 and, as indicated, Mutual filed an

²⁴Mutual enlarged its Bear Valley powerhouse and installed a 280 KW generator in 1928, bringing Mutual's total generating capacity to 760 KW.

²⁵Most of the water released at the Rincon penstock is utilized to generate electric power at the Rincon powerhouse. The water which is discharged through the Rincon tailrace and the small amount which bypasses the powerhouse is then delivered to the Rincon Band.

²⁶In 1954, however, Mutual sold its electric distribution facilities to SDG&E, and thereafter delivered electric energy only to that company — about 95% — and the Rincon Band — about 5%.

application in 1921 to license the works of its water and water power project from the intake tunnel on the San Luis Rey River to the tailrace of the Bear Valley powerhouse.

The Federal Power Commission initiated an inspection of Mutual's facilities. In May 1922 the U.S. Geological Survey submitted its report, indicating that Mutual's facilities were "[p]ractically the only irrigation development of any magnitude" in the area, and stating,

"The water supply available for the project of the Escondido Mutual Water Company is limited to the natural flow of San Luis Rey River and the capacity of the diversion canal. The company has no storage works on the main stream, the amount of water stored in [Lake Wohlford] being that which the company is able to divert through its 15 mile conduit leading from the river.

* * *

"It should be kept in mind that the use of water for power by the Escondido Mutual Water Company is secondary and subordinate to its use for irrigation purposes."

The U.S. Geological Survey advised the Commission that Henshaw was then currently proposing to dam the river at Warner's Ranch²⁷ and recommended, first, that Henshaw be requested to file an application for a license, and second, that consideration of Mutual's application be deferred so that the two applications could be considered together.

On June 5, 1922, the Commission wrote to Henshaw inquiring as to the status of the dam and advising him of the licensing requirements. Henshaw's agent replied on July 21, 1922, to the effect that the development of power had not definitely been decided upon, and, "When we have

²⁷Construction of the dam was begun in April or May 1922.

reached some conclusion we expect to make a formal application to your Bureau for permit and rights-of-way."

On June 28, 1922, Henshaw entered into an agreement under which Interior, acting on behalf of the Rincon and Pala Bands, agreed not to oppose the construction of his dam and the resulting impoundment and diversion of San Luis Rey waters. The agreement acknowledges that the Rincon Band has

"a prior first right to the normal flow of the said San Luis Rey River to the extent of the first six second feet of water naturally flowing in said river at the intake of the Escondido Mutual Water Company's canal,"

and that the Pala Band has

"a prior first right to the normal flow of the said San Luis Rey River to the extent of the first six second feet of water naturally flowing in said river, at the point where it crosses the eastern boundary line of said Pala Indian Reservation. . . ."

The agreement defines "natural flow" as the amount of water actually entering the impoundment added to the amount of water produced by the watershed between the dam and the intake of Mutual's canal. And it provides that if the watershed between the dam and the intake fails to produce water in the quantities to which the Rincon Band is entitled, then Henshaw

"will deliver or cause to be delivered, at his expense and without cost to said Indians, at the aforesaid intake of the Escondido Mutual Water Company's canal, water, in such quantities and at such times as will, with the water, if any, then in said river at said intake, produce the natural flow up to 6 second feet; provided that [Henshaw] shall not be obliged at any time to liberate from [his] reservoir any greater quantity of

water than shall at the time be flowing into it."²⁸

With respect to the Pala Band, the agreement provides that if the San Luis Rey waters available for their use fall below the quantity required by them, then Henshaw

"agrees at his own expense and without cost to the Indians of said reservation to sink such wells, install such pumps, motors, pipes, pipelines, fittings, appliances, material and supplies . . . as may be necessary to furnish the Indians of the said Pala Reservation with the quantity of water for irrigation purposes to which they are entitled not exceeding a maximum of six cubic feet per second."²⁹

A month later Henshaw incorporated San Diego County Water Company³⁰ which is Vista's immediate predecessor and succeeded in September 1922 to his water rights as well as his interests in Warner's Ranch and the agreement of June 28, 1922. On November 10, 1922, San Diego County Water Company entered into an agreement with Mutual³¹

²⁸Henshaw also agreed therein that if the level of Well No. 1 on the Rincon Indian Reservation is not as high as the bottom of the nearby San Luis Rey River bed on May 1st of each year, he would do one of several things, at his option—and the particular option selected has been to furnish power without cost to the Rincon Band "to satisfy their requirements of water for domestic and irrigation purposes during the months of May to October, inclusive, of any such year."

²⁹Henshaw also agreed to operate and maintain the wells at his own expense, and that the "installation of each and every part" would be subject to the approval of the Pala Band.

³⁰Its Articles of Incorporation state that it was formed, among other purposes, to construct, operate and maintain plants for the generation and distribution of electricity, and dams and reservoirs for impounding, storing and distributing water "for irrigation, domestic and all other uses and purposes. . . ."

³¹The agreement indicates that if Henshaw Dam was constructed to impound 200,000 acre-feet of water, as it later was, the annual runoff from the San Luis Rey watershed was estimated to yield 28,000 acre-feet for irrigation or 24,750 acre-feet for domestic use. In fact, the runoff averaged 25,218 acre-feet during Henshaw Dam's first 28 years of operation and only 6,878 acre-feet during its next 23 years of operation (during which period the Warner Basin was pumped).

The agreement also indicates that it was contemplated that Henshaw-impounded water would be used to generate electric power.

in which

A. San Diego County Water Company agreed to sell and deliver at Mutual's intake, and Mutual agreed to purchase and take, perpetually, 2,500 acre-feet of water at a price of \$15 per acre-foot, of which 500 acre-feet are to be delivered each June, July, August and September and 250 acre-feet each October and November (and, at Mutual's option, an additional 2,500 acre-feet upon the same terms)

B. Mutual granted to San Diego County Water Company rights to utilize perpetually up to two-thirds of the carrying capacity of the Escondido Canal to Lake Wohlford, to store water in Lake Wohlford to the extent of any unused and unnecessary capacity of Mutual, and to discharge waters from Lake Wohlford; and San Diego County Water Company agreed to pay \$10,000 annually for such rights.

C. Mutual agreed with San Diego County Water Company that the Escondido Canal would be operated and maintained by a "superintendent" to be selected by the two of them (but removed by either of them), and that the superintendent's annual budget (including his salary and "also plans and estimates for any reconstruction work or betterments which in his judgment may be required") would be subject to their joint approval. Operating and maintenance expenses would be shared in proportion to their respective volumes of water carried in the conduit during the preceding year.

D. Mutual agreed to construct a new outlet from Lake Wohlford which would be large enough for Mutual's and San Diego County Water Company's waters, the cost to be shared equally.

E. San Diego County Water Company agreed to enlarge the Escondido Canal from a capacity of about 40 cfs to 70 cfs, to line the canal and to construct Hellhole Siphon, the

cost to be borne two-thirds by San Diego County Water Company and one-third by Mutual.

F. For the asserted purpose of satisfying the Rincon Band's water rights, San Diego County Water Company agreed to maintain a continuous flow of 6 cfs at Mutual's intake from January through June each year, releasing such amounts not exceeding the inflow into Lake Henshaw as would bring the "amount naturally flowing at said intake" to 6 cfs, and Mutual agreed to deliver from July through December each year the amounts specified in the purported agreement of February 2, 1914.

Henshaw Dam was completed in December 1922. As raised in 1927, it occupies 1.91 acres of the Cleveland National Forest and could impound approximately 194,323 acre-feet of water (inundating 17.4 acres of the Cleveland National Forest). But such storage was never attained, and no water has passed over its spillway. Lake Henshaw reached a maximum volume of about 180,000 acre-feet in 1943; but only eight years later its storage waters were depleted to zero or near zero as the result of a drought. Beginning in 1951 the runoff from the San Luis Rey watershed into Lake Henshaw has generally been augmented by pumping the underlying Warner Basin; and Lake Henshaw has remained under 20,000 acre-feet continuously, except for brief periods in 1952, 1958, 1966, 1968-9 and 1978.³²

³²Commissioner Hall and three aides involved in preparing this Opinion and order inspected Lake Henshaw on June 1, 1978, following the heaviest or near-heaviest Winter rainfall on record, at which time Lake Henshaw was said to contain more than 30,000 acre-feet of water. But, because of seismic conditions Vista was required by the California Department of Water Resources, Division of Safety of Dams, to evacuate Lake Henshaw to 10,000 acre-feet and is required to hold it at that level until appropriate modifications are made to comply with current safety standards.

In 1923 Escondido acquired from Mutual and began to operate the portion of Mutual's water distribution system which was then within Escondido's boundaries, but Escondido remained dependent upon Mutual to supply it with water from the San Luis Rey River.

Mutual refiled its application for a license on January 19, 1924, indicating as it had in 1921 that the source of its water supply was the San Luis Rey River.³³ But Mutual added that the capacity of its conduit was being enlarged from 42 second feet to 70 second feet, that the enlarged conduit would be used for the transmission of Mutual's waters as well as those of San Diego County Water Company, and that "the joint waters of the two companies, conveyed through the intake conduit, shall be used to generate power at the new project powerhouse, the power or proceeds therefrom to be pro-rated according to respective ownership of the water passing through the plant."³⁴ That powerhouse was never constructed.

By letter dated February 26, 1924, O. C. Merrill, Executive Secretary of the Federal Power Commission, tendered to Mutual a draft of a proposed license which provided in Article 22 that Mutual would

"retain the possession of all property . . . including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and . . . none of such properties will be sold, transferred, abandoned, or otherwise disposed of with-

³³Mutual said, among other matters, "The project does not involve the construction of any dam or dams across the San Luis Rey River, the source of water for the project."

³⁴The Escondido Canal ordinarily is closed for maintenance work during each October, November and/or December, the exact periods varying from year to year. Scheduled maintenance and unscheduled repairs are significant as to both cost and the continuity of the service in view of the rugged terrain in which most of the conduit is situated.

out the approval of the Commission.”

By letter dated April 7, 1924, Mutual advised Mr. Merrill of its agreement with San Diego County Water Company and inquired whether it conflicted with Article 22. On April 16, 1924, Mr. Merrill asked for a copy of that agreement. And by letter dated May 2, 1924, he acknowledged receipt of a copy of “ ‘Agreement between San Diego County Water Company and Escondido Mutual Water Company dated May 10, 1922’ ”³⁵ and advised Mutual,

“I would state that a study of this agreement indicates that you retain full ownership and control of the property so far as necessary to comply with the requirements of a license issued under authority of the Federal Water Power Act, and that there appears to be no grounds for conflict with article 22 of the license in question (Project No. 176).”

The license was issued on June 25, 1924; and a year later, in June 1925, Mutual began to receive Henshaw-stored water which it had purchased from San Diego County Water Company under the agreement of November 10, 1922. And eight months later, in February 1926, Vista (which had been organized in 1923) began to receive Henshaw-stored water which it purchased from San Diego County Water Company under a contract dated October 2, 1924.

In the meanwhile, on March 5, 1925, the Federal Power Commission issued a minor part license to a predecessor of SDG&E to construct, operate and maintain 2.4 miles of primary 88 KV transmission line and a 40-foot right-of-way from the Rincon powerhouse, across the Rincon Indian Reservation and to another licensed primary transmission line,

³⁵It is assumed that Mr. Merrill was furnished a copy of the agreement of November 10, 1922, since San Diego County Water Company had not been incorporated on May 10, 1922.

which minor part was designated as Project No. 559. Although that 50-year license, as subsequently amended, expired on March 4, 1975, annual licenses have been issued pursuant to Section 15(a) of the Federal Power Act.

In 1928, pursuant to the agreement of November 10, 1922, Mutual and San Diego County Water Company constructed a concrete diversion dam some 150 to 200 feet upstream from Mutual's diversion tunnel.³⁶ The dam was described in a 1929 letter from Interior's Supervising Engineer as "an impervious concrete structure extending to bed rock and thereby intercepting the underground flow and cutting off all supply to the lower canals [presumably of the Rincon and Pala Bands] from this source."

In 1928 the Bear Valley powerhouse was enlarged and a third (280 KV) generator was installed.³⁷ In connection therewith, and pursuant to the agreement of November 10, 1922, Mutual and San Diego County Water Company constructed a new outlet from Lake Wohlford constituting principally of a 2,521-foot long 48-inch pipeline which leads to the penstocks at the Bear Valley powerhouse. San Diego County Water Company paid two-thirds of the cost and Mutual, one-third.³⁸

³⁶Mutual's application to amend its license to authorize the construction, operation and maintenance of the dam was then pending, but the license was not so amended until 1939.

³⁷While Mutual's generation of electric energy at its two facilities varies widely with the availability of water, it averages about 4,000,000 kilowatt-hours per year.

³⁸Apparently the 1939 amendment to Mutual's license also covered the modification of this project work. But in an agreement dated October 1, 1941, Mutual and San Diego County Water Company acknowledged that the latter "owns an undivided two-thirds interest in said 48 inch pipe line; and [Mutual] owns an undivided one-third interest therein," and agreed that they would pay their respective shares of taxes levied against the pipeline. Like the construction of the concrete diversion dam, the construction of the pipeline without the Commission's prior approval clearly violated Article 4 of Mutual's license and Section 10(b) of the Federal Water Power Act [now Section 10(b) of the Federal Power Act]. And the change in ownership of the pipeline clearly violated of the Federal Water and Article 22 of Mutual's license and Section 8 of the Federal Power Act and required San Diego County Water Company to become a joint licensee of Project No. 176 with Mutual.

Following the completion of the enlargement of the Escondido Canal in 1929 and the commencement of its joint use, a joint canal superintendent's office was established as a separate entity which was responsible to the Boards of Directors of Mutual and San Diego County Water Company (and now Vista), but not controlled by either company. Since that time, the joint canal superintendent's office has been responsible for operating and maintaining that conduit, including regulating, measuring and recording the flows into and through the conduit, computing natural and Indian flows, and repairing access roads and a communication system. The joint canal superintendent's office submits annually to the respective Boards of Directors proposed estimates of maintenance and repair work, and is financed by a revolving fund contributed by Mutual and Vista in proportion to their respective amounts of water carried through the conduit during the preceding year.

In an agreement dated October 1, 1941, Mutual and San Diego County Water Company granted one another reciprocal storage rights in Lakes Wohlford and Henshaw.³⁹ In another agreement dated February 9, 1943, San Diego County Water Company granted Mutual the right to utilize some of its water to generate power at its Bear Valley facilities.⁴⁰

³⁹Vista's share of the water which is discharged from the Escondido Canal into Lake Wohlford ordinarily is released from Lake Wohlford concurrently and, therefore, is rarely placed in storage. As a result, Lake Wohlford ordinarily is used to store Mutual's share of the water.

⁴⁰The water released from Lake Wohlford flows through the 48-inch jointly owned pipeline, as indicated, and then through one or the other of two penstocks, one owned by Mutual and the other by Vista. The water entering Mutual's penstock is Mutual's water and, when capacity is available, also some of Vista's water; and the water which so flows through Mutual's penstock is utilized to generate electric power at the Bear Valley powerhouse and is then discharged into either Escondido's water distribution system or the Vista Canal for transportation to Vista's service area. The water entering Vista's penstock, on the other hand, is Vista's water, by-passes the Bear Valley powerhouse and is discharged into the Vista Canal.

In 1946 Vista acquired all of the outstanding stock of San Diego County Water Company and thereupon succeeded to the latter's interests in Lake Henshaw and Warner's Ranch.

During the 1948-49 period the course of the Escondido Canal was changed from Bear Valley Creek by the installation of a 6,000-foot 45-inch pipeline leading to Escondido Creek and occupying 3.08 acres of the San Pasqual Indian Reservation. That change was authorized in a license amendment issued April 2, 1957, which also provided for an annual charge of \$25 which was found reasonable for "recompensing the San Pasqual Indians for the use, occupancy and enjoyment of the San Pasqual Indian Reservation. . . ." No other annual charges for the use of Indian lands by Project No. 176 have been fixed.⁴¹

In 1950 Escondido became a member agency of the San Diego County Water Authority which, in turn, is a member agency of the Metropolitan Water District of Southern California (MWD). As a result, Escondido obtained a supplementary supply of Colorado River water.

Drought conditions in northern San Diego County in the late 1940's depleted Lake Henshaw to the point that on September 11, 1950, Mutual and Vista entered into a "Temporary Pumping Agreement" under which ground water was pumped from a portion of the Warner Basin underlying Warner's Ranch to augment the surface flows into Lake Henshaw, and under which Vista agreed to sell to Mutual, and did sell, "In-lieu A Water" for \$20 per acre-foot and

⁴¹Prior to the issuance of the license Interior indicated that annual charges for the occupancy of Indian lands would not be necessary because the agreement of February 2, 1914, was to be incorporated into the license.

"In-lieu B Water" for \$35 per acre-foot.⁴² That agreement was supplemented on August 10, 1951, and again on March 25, 1957. Under the latter supplement, Mutual's and Vista's normal needs for future water years were fixed at 10,600 acre-feet and 14,600 acre-feet, respectively, and the parties agreed to share equally the cost of developing a Secondary Well Field on Warner's Ranch and to divide equally the water produced from that field.⁴³

In 1954 Vista began to purchase supplementary Colorado River water from Bueno Colorado Municipal Water District, and in 1955 Mutual began to purchase supplementary Colorado River water from Rincon del Diablo Municipal Water District, both of which are member agencies of San Diego County Water Authority which, as indicated, is a member agency of MWD.

Notwithstanding Mutual's, Escondido's and Vista's common access to Colorado River water, the Escondido Canal continued to carry the major portion of the domestic and irrigation water for the Escondido and Vista service areas. The Escondido Canal conveys an average of about 14,600 acre-feet per year consisting of 4,100 acre-feet representing Mutual's appropriation of the San Luis Rey River, 2,700 acre-feet representing Mutual's purchases of Henshaw-stored water from Vista, and 7,800 acre-feet representing Vista's appropriation of the San Luis Rey River. And substantially

⁴²Under the agreements of June 21, 1912, November 10, 1922, an October 1, 1941, Mutual is guaranteed annually 4,143 acre-feet of natural flow at its diversion dam (its A Water) and is allowed to purchase annually up to 5,000 acre-feet of Henshaw-stored water (its B Water). Mutual's "In-lieu A Water" is the pumped volume it is allowed to purchase equivalent to the lesser of (a) the shortfall of its A Water and (b) 3,000 acre-feet. Its "In-Lieu B Water" is the pumped volume it is allowed to purchase equivalent to the shortfall of its B Water.

⁴³The parties have stipulated, "The water pumped from the wells above Lake Henshaw is not intended for release at the Rincon penstock, and no credit is given the Rincon Indians as a result of such pumping."

all of the summer flow in the Escondido Canal consists of Henshaw-stored water.

In 1963 an agreement in principal was reached for the sale of Mutual's assets to Escondido, including Mutual's water distribution system outside Escondido's boundaries and the works of Project No. 176. On April 5, 1965, they filed with the Commission a joint application for permission to transfer Mutual's license for Project No. 176. But the proposed sale was blocked in 1966 by a shareholder's lawsuit.

In 1968 Escondido commenced condemnation proceedings to acquire Mutual's assets. After lengthy negotiations they agreed upon a price of \$6,250,000, subject to certain adjustments, and in April 1970 they signed a formal agreement which would have settled the proceedings and transferred Mutual's assets to Escondido. But on July 25, 1969, the Rincon and La Jolla Bands initiated litigation⁴⁴ against Mutual, Escondido, Interior and the United States Attorney General requesting, among other matters, declaratory relief to the effect that the purported agreements of June 4, 1894, and February 2, 1914, were void, an injunction prohibiting the diversion of San Luis Rey waters into the Escondido Canal, and substantial damages. Delays caused by the litigation resulted in rescission of the April 1970 agreement. And on October 21, 1970, Mutual and Escondido filed a notice of withdrawal of their joint application to transfer the license.

⁴⁴Civil Action No. 69-217-S, United States District Court for the Southern District of California.

In July 1972 the United States initiated litigation in the same court against Mutual and Vista (Civil Action No. 72-271-S) seeking reformation of allegedly breached water contracts, and damages, and the Rincon and La Jolla Bands initiated litigation against Vista (Civil Action No. 72-276-S) seeking to invalidate certain water contracts, and damages. The three lawsuits were consolidated and, although there have been some discussions toward their settlement, they have not been tried.

On June 19, 1970, Escondido commenced a tender offer to purchase all of Mutual's stock not owned by it and, as a result, acquired approximate 90% control of Mutual through stock and/or proxies.⁴⁵ The terms of the tender offer included an Operating Agreement under which Escondido's and Mutual's water distribution systems would be merged and operated by Escondido, and Project No. 176 would continue to be operated and maintained by Mutual. The Operating Agreement was approved by the United States District Court for the Southern District of California subject to certain conditions and thereafter became effective on April 30, 1971.⁴⁶

Procedural

On September 25, 1970, during the course of Escondido's tender offer, Interior initiated this consolidated proceeding by filing with the Commission a Complaint on behalf of the La Jolla, Rincon and San Pasqual Bands against Mutual and Escondido, alleging that Mutual violated its license and the Federal Power Act (1) by constructing the concrete diversion works intercepting the surface and ground flows without the Commission's prior approval and without authority from the United States or the Bands; (2) by constructing a residence near the diversion works without the Commission's approval and without authority from the United States or

⁴⁵Escondido proposes to acquire all of Mutual's outstanding stock and dissolve Mutual.

⁴⁶By letter dated March 9, 1971, the General Counsel of the Federal Power Commission expressed his opinion (which he said "is not binding upon the Commission") that the Operating Agreement did not require Commission approval "because it does not undertake to transfer the operation of the licensed project facilities." The Bands and Interior contend that Escondido is operating Project No. 176, and there is evidence in the record from which such a conclusion can be drawn. But there is also counterbalancing evidence. In any event, there is no need to decide the issue because, as indicated, Mutual will be a joint licensee of Project No. 176 under the new license.

the Bands; (3) by permitting Vista and its predecessors to exercise joint possession, operation and control of the licensed facilities, and increasing the size of the conduit, changing its type and increasing its easement burden, all without authority of the Commission, the United States or the Bands; (4) by constructing and maintaining roads and other facilities outside the rights-of-way; and (5) by failing to release waters reserved for the Rincon Band under the agreement of February 2, 1914.

Interior asserted, among other matters, that the continued operation of the licensed works was in substantial conflict with the purposes for which the three reservations had been created in that the water table underlying the La Jolla and Rincon Indian Reservations was being lowered, the license did not satisfy the water needs of the San Pasqual Band, the route of the conduit divided the San Pasqual Indian Reservation and the compensation for the use and occupancy of the reservations was inadequate. Interior requested revocation of the license and/or injunctive relief prohibiting continued violations, damages, releases of water for the benefit of the three Bands, and past and present annual charges.

Mutual and Escondido filed an answer which generally admitted factual matters (including the fact that Vista and its predecessor "have, pursuant to contract, used the Mutual's conduit to transport water"), denied any wrongdoing and asserted that a timely application for a new license would be filed.

The La Jolla, Rincon and San Pasqual Bands filed a Petition to Intervene and Complaint in Intervention alleging, among other matters (1) that Section 8 of the Act of January

12, 1891 (commonly called the Mission Indian Relief Act)⁴⁷ prevented the Federal Power Commission from acquiring authority to grant rights-of-way or other property interests related to the conveyance of water in their reservations without their prior consent; and (2) in view of the fact that Mutual's service area has access to alternate supplies of water and power (unlike the 1890's when the conduit was constructed and the 1910's when power was added), Mutual's dominant purpose in continuing to generate power "is to maintain a colorable claim to the rights-of-way and other interests".⁴⁸

⁴⁷Section 8 of the Mission Indian Relief Act provides, in pertinent part,

"That previous to the issuance of a patent for any reservation . . . the Secretary of the Interior may authorize any citizen of the United States, firm, or corporation to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such reservation for agricultural, manufacturing, or other purposes, upon condition that the Indians owning or occupying such reservation or reservations shall, at all times during such ownership or occupation, be supplied with sufficient quantity of water for irrigating and domestic purposes upon such terms as shall be prescribed in writing by the Secretary of the Interior, and upon such other terms as he may prescribe. . . . And any patent issued for any reservation upon which such privilege has been granted, or for any allotment therein, shall be subject to such privilege, right of way or easement. Subsequent to the issuance of any tribal patent, or of any individual trust patent . . . any citizen of the United States, firm, or corporation may contract with the tribe, band, or individual for whose use and benefit any lands are held in trust by the United States, for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose."

⁴⁸They cited a valuation report which had been prepared for Mutual in 1962 and indicated that the direct expenses of operating the Rincon power facilities for "the past seven years . . . have been nearly \$400 per year greater than revenue." Whatever inferences might be drawn from the economic situation of the late 1950's and early 1960's, the record indicates that the revenues from both power facilities were expected to exceed their direct operating expenses by approximately \$13,000 in the 1973-74 period based upon their historic annual average power production and the fact that revenues per kilowatt-hour rose sharply in the early 1970's.

Although Mutual and Escondido opposed the petition, the Commission, by order issued April 14, 1971, designated Interior's Complaint as Docket No. E-7562 and initiated an investigation pursuant to Section 306 of the Federal Power Act to consider (1) the alleged violations, and (2) annual charges for the use of the Indian lands. Additionally, the Commission permitted the interventions.

In the meanwhile, on April 1, 1971, Mutual filed an application for a new minor license⁴⁹ for Project NO. 176, proposing in substance to continue operating the project works in a manner similar to that which had been followed for the preceding half-century.

The La Jolla, Rincon and San Pasqual Bands filed a combined petition to intervene and motion to consolidate Mutual's application with Docket No. E-7562, asserting, among other matters, that Section 10(e) of the Federal Power Act (pertaining to annual charges) prohibits the Commission from issuing a new license without their consent, and they "hereby specifically refuse to approve, consent to, or ac-

⁴⁹Section 10(i) of the Federal Water Power Act contained special provisions for certain small or so-called "minor" projects "of not more than one hundred horsepower capacity". The installed capacity of Project No. 176 in 1924 was 800 horsepower and, therefore, the Federal Power Commission issued a license for a "major" project. Section 10(i) of the Federal Power Act was last amended in 1962 and now provides,

"In issuing licenses for a minor part only of a complete project, or for a complete project of not more than two thousand horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this Part, except the license period of fifty years, as it may deem to be in the public interest to waive under the circumstances: *Provided*, That the provision hereof shall not apply to annual charges for use of lands within Indian reservations."

The installed capacity of Project No. 176 as enlarged in 1928 is 1,300 horsepower and, therefore, it qualifies for a license for a "minor" project. Furthermore, Mutual has requested waiver of certain provisions of the Federal Power Act pursuant to Section 10(i).

quiesce in" a new license. Interior and SDG&E also filed petitions to intervene. As part of its petition, Interior moved for consolidation asserting that the issuance of a new license to Mutual would violate Section 23(b) of the Federal Power Act because Vista "exercises joint possession, operation and control of the facilities for which this new license is sought", and because "the waters utilized by Project No. 176 are stored, released and controlled upstream from the said Project on the San Luis Rey River at Henshaw Dam which is owned by Vista Irrigation District."

The Commission, by order issued July 30, 1971, initiated an investigation pursuant to Sections 4(g) and 306 of the Federal Power Act, among other provisions, "to consider the extent, if any, that Vista Irrigation District is involved in the operation of Project No. 176 and the occupancy of Indian lands or other lands of the United States", designating that investigation as Docket No. E-7655. Additionally, the Commission consolidated the complaint, relicensing and investigatory proceedings and permitted the interventions of Interior, the three Bands and SDG&E in the consolidated proceeding.

On May 22, 1972, as supplemented October 18, 1972, Interior requested the Commission to recommend to Congress that the United States exercise its right to recapture the portion of Project No. 176 from the diversion works on the San Luis Rey River to the point of discharge into Lake Wohlford.³⁰ Interior indicated that it would eliminate the power drop on the Rincon Indian Reservation and operate the Escondido Canal to transport water to the La Jolla, Rincon and San Pasqual Indian Reservations as well as the

³⁰Interior's request would permit the Commission to relicense the portion of Project No. 176 downstream from the point of discharge into Lake Wohlford.

Escondido and Vista service areas:

“The public interest will be served by placing operation and control of the diversion works, the conduit, etc. in the hands of the United States thus ending the long controversy over the operation of that canal. The United States can then be responsible to see that the canal is operated for the benefit of all who have a right to use the water therefrom and it can see that each party gets the amount of water to which they are entitled.”

On December 12, 1972, the Commission designated Interior's proposal to recapture and operate the Escondido Canal as part of the consolidated proceeding.

On June 5, 1972, the La Jolla, Rincon, San Pasqual and Pauma Bands⁵¹ filed an untimely application for a nonpower license asserting (1) that “the license for power purposes can no longer be justified economically” because the 1962 evaluation report prepared for Mutual indicated, as noted, that the direct expenses of the Rincon power plant exceeded its revenues, and the return on the Bear Valley power plant would not pay the interest on its replacement cost, (2) that a nonpower license would have virtually no impact on the power system served by the licensed facilities because the power generated represents less than 1% of SDG&E's purchased energy, (3),

“The Bands plan to make beneficial use of the water by irrigating more reservation acreage and developing a new recreational facility on the Rincon Indian Reservation called Paradise Lake. The La Jolla Band plans to further expand its fishery and develop additional camping and other recreational facilities on the reservation. In addition, under the Bands' application, current rights-of-way under Project No. 176 will be sub-

⁵¹The Pala Band joined in the application on July 9, 1973.

stantially narrowed, thereby freeing up land for other uses, and other rights-of-way will be either relocated or fenced, thereby making their use consistent with the needs and purposes of the Bands",⁵²

and (4) that the loss of water from the San Luis Rey River basin will cease and the water restored to in-basin uses:

"For all these reasons . . . the Bands submit that their application presents an alternative which results in the best comprehensive plan for improving and developing the San Luis Rey River basin."

On September 17, 1973, the Commission permitted the Bands' late filing and made it part of the consolidated proceeding.

Hearings were held in Escondido and Pala, California, and Washington, D.C., on 34 dates from September 19 through December 12, 1973.

On March 4, 1974, SDG&E filed an application for a new license for its Project No. 559 primary transmission line, and on September 3, 1974, the Commission permitted Mutual and the Rincon Band to intervene in that application and made it part of the consolidated proceeding. Hearings were held in Washington, D.C., on three additional dates in July 1974.

On November 25, 1975, more than four years after Mutual filed its application for a new license, Escondido adopted Mutual's application as part of its own application to become a joint licensee of Project No. 176. And on January 12, 1976, Mutual and Escondido amended their joint application

⁵²While the application purports to seek a nonpower license, it speaks of a proposed new water conduit north of the San Luis Rey River on which power would be developed for irrigation pumping. It also speaks of maintaining the Rincon and Bear Valley power facilities "until a major breakdown occurs", at which time such facilities would be sold for salvage.

to propose the construction of 8,550 feet of 48-inch pipeline principally on non-reservation lands and a sequential abandonment of approximately 12,000 feet of conduit on the eastern portion of the San Pasqual Indian Reservation, to reduce potential hazards from the open canal and protect their water supply from possible contamination.⁵³ In addition, the remaining 825 feet of open canal on the San Pasqual Indian Reservation would be fenced, and the abandoned rights-of-way would be restored to grade.

Additional hearings were held in Escondido and Pala, California, Washington, D.C., on 14 dates in December 1975 and January 1976, bringing the record to 11,149 transcript pages and approximately 600 exhibits.

After briefing, the presiding administrative law judge issued a 110 page Initial Decision on June 1, 1977, in which he discussed the many issues which had been raised and ultimately concluded, subject to Commission review, that "the operation now going on and proposed for licensing is not a power project licensable under the Federal Power Act. . . ."⁵⁴ Accordingly, he dismissed Interior's Complaint and the Mutual/Escondido and SDG&E applications for new licenses and closed the investigation of Vista.

Briefs on and opposing exceptions were filed by the Bands and Interior jointly; by Mutual, Escondido and Vista jointly⁵⁵; by Vista separately and by the Commission staff. In addition, a brief on exceptions was filed by Interior separately;

⁵³Substantially the same proposal had appeared in Mutual's revised report on environmental factors filed April 1, 1974.

⁵⁴Nonetheless, he also indicated that a license should be issued, if at all, to Mutual, Escondido and Vista.

⁵⁵The brief on exceptions indicates for the first time in this proceeding that Vista would accept the status of being a joint licensee of Project No. 176 with Mutual and Escondido, but it also indicates that Vista opposes vigorously any licensing of its Henshaw facilities.

a document styled "Motion For Leave To File Amicus Curiae Brief On Exceptions and Amicus Curiae Brief On Exceptions" was filed by Pacific Gas and Electric Company (PGandE)⁵⁶; a motion for leave to file a supplemental brief was filed by the Bands and oppositions to that motion were filed by Mutual, Escondido and Vista jointly and by the Commission staff. And finally, the principal parties with the exception of the Commission staff have requested oral argument in view of the novelty and complexity of the issues and the fact that this is the first contested relicensing proceeding to reach the Commission for decision.

JURISDICTION

The Present Project No. 176

The presiding judge concluded that Project No. 176 is not subject to the Commission's licensing jurisdiction because the generation of electric power is and always has been incidental to the project's primary purpose of conveying water for domestic and irrigation consumption. The production of power is insignificant in every way⁵⁷, he said, and

"When the power production facilities of a licensed power project become so insignificant their economic feasibility is irrelevant to the continued operation of the entire project it becomes clear that the operation

⁵⁶PGandE is not a party to this proceeding.

⁵⁷The judge found that the power facilities of Project No. 176 were old and only marginally profitable, that the Rincon power plant is not operated to maximize the generation of power, and that the 95% of the Project No. 176 power which is sold to SDG&E furnishes about 0.02% of the latter's power requirements and is considered by SDG&E as being non-scheduled power of relatively low value. He indicated, additionally, that the status of Project No. 176 was altered from "major" (more than 100 horsepower) to "minor" (not more than 2,000 horsepower) by the 1962 amendment to Section 10(i) of the Federal Power Act.

cannot, by any rational definition, be considered to be a power project."

And finally, he indicated that rights-of-way for irrigation canals are grantable by Interior under 43 U.S.C. §§ 946-9 and that 43 U.S.C. § 951 specifically provides, in this connection, that "said rights of way may be used . . . for the development of power, as subsidiary to the main purpose of irrigation or drainage."

The Bands and Interior support the judge's conclusion that Project No. 176 is not a power project. Interior asserts, among other matters, that when the production of power on a domestic and irrigation water supply project is *de minimis* (a) Interior's trust responsibilities pertaining to Indian reservations and natural resources are not displaced by the Federal Power Act and (b) the Commission should not exercise its licensing jurisdiction. Interior contends, in this connection, that when water rights are challenged in court and the challenge has substantial support in law, then applicants for a license cannot submit "satisfactory evidence" of their water rights as required by Section 9(b) of the Federal Power Act⁵⁸ until that challenge is resolved, for the applicants lack the *res* (water) upon which the Commission's jurisdiction can be exercised.

Mutual, Escondido, Vista and the Commission staff contend, on the other hand, that Project No. 176 is jurisdictional. We agree, and grant their exceptions. It has always

⁵⁸Section 9 provides, in pertinent part,

"That each applicant for a license hereunder shall submit to the Commission—

* * *

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes. . . ."

been understood that the principal purpose of the Federal Water Power Act of 1920 was to establish a national policy to promote the comprehensive development of water power on government lands and navigable waters other than by the government itself, and that such policy would be administered by abolishing the piecemeal authorities of the Secretaries of the Interior, Agriculture and War over the nation's hydro-electric resources and centralizing them in the Federal Power Commission.⁵⁹

The Commission is authorized by Section 4(e) of the Federal Power Act:

"To issue licenses . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for . . . the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction . . . or upon any part of the public lands and reservations of the United States. . . ."⁶⁰

And those who may be so licensed are subject to the prohibitions of the first sentence of Section 23(b) thereof:

"It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters

⁵⁹445 F.2d, at page 750.

⁶⁰It is not disputed that the La Jolla, Rincon, San Pasqual, Pauma and Pala Indian Reservations and the Cleveland National Forest are "reservations" within the meaning of Section 3(2) of the Federal Power Act and that the government lands occupied by Project No. 176, other than those foregoing "reservations" which are so occupied, are "public lands" within the meaning of Section 3(1).

of the United States, or upon any part of the public lands or reservations of the United States . . . except under and in accordance with the terms of . . . a license granted pursuant to this Act.”

The foregoing portions of Sections 4(e) and 23(b) define the parameters of the Commission’s licensing jurisdiction which are applicable to most situations and are pertinent to our analysis.⁶¹ So long as any part of a project is situated on navigable waters, or on public lands or reservations, and so long as that project generates any electric power, however minor in amount and however insignificant to the project as a whole,⁶² and so long as interstate or foreign commerce

⁶¹The fact that the first sentence of Section 23(b) prohibits the acts associated with project works which the Commission is authorized by Section 4(e) to license, establishes that the Commission’s jurisdiction over constructing, operating and maintaining project works within the scope of Section 23(b) is mandatory rather than discretionary, contrary to Interior’s contention.

⁶²The fact that Section 10(i) authorizes administrative waivers of most licensing provisions, rather than administrative exemption from the Federal Power Act, indicates without question that even the smallest projects in terms of power production are required to be licensed. Project No. 176 was a major project prior to the 1962 amendment to Section 10(i), and the legislative history of that amendment indicates clearly that its purpose was not to exempt any projects, but only to change the dividing line between major and minor projects. See H.R. No. 2241 at U.S. Code Cong. & Adm. News, 87th Cong., 2nd Sess., 1962, at page 2375.

Furthermore, the Supreme Court, in *Federal Power Commission v. Florida Power & Light Co.*, 404 U.S. 453 (1972), said in a footnote, 404 U.S., at page 461,

“If any FP&L power has reached Georgia, or FP&L makes use of any Georgia power, no matter how small the quantity, FPC jurisdiction will attach because it is settled that Congress has not ‘conditioned the jurisdiction of the Commission upon any particular volume or proportion of interstate energy involved and we do not . . . supply such a jurisdictional limitation by construction.’ *Connecticut Power and Light*, [324 U.S. 515 (1945)], at 536. See also *Pennsylvania Water and Power Co. et al. v. FPC*, 343 U.S. 414 (1952).”

Accord, with respect to jurisdiction based upon water power which affects interstate commerce, see the Commission’s orders affirming

(footnote continued on following page)

is affected, the works of that project are subject to be licensed and required to be licensed under the Federal Power Act.⁶³

Although the San Luis Rey River is not navigable, portions of Project No. 176 are situated on public lands and reservations of the United States. The Rincon and Bear Valley power facilities have generated approximately 4,000,000 kilowatt-hours on a yearly average since 1923 and the power which is so generated is transmitted through SDG&E into the California Power Pool and elsewhere through the Western Systems Coordinating Council. As a result, we find that the facilities of Project No. 176 are clearly subject to the Commission's licensing authority under Section 4(e) of the Federal Power Act and must be licensed by virtue of Section 23(b).

Furthermore, 43 U.S.C. §§ 946-9 and 951 on which the presiding judge relies were repealed by the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701,

jurisdiction issued December 14, 1976, and on reconsideration issued February 17, 1977, in *Natahala Power and Light Company*, Project Nos. 2601, *et al.*

Administrative exemptions were not authorized until the enactment of Section 30 (as Section 213 of the Public Utility Regulatory Policies Act of 1978), which authorizes the Commission to exempt certain facilities located on non-Federal lands from the licensing requirements of the Federal Power Act. Public Law 95-617, § 213, 92 Stat. 3148 (Nov. 9, 1978).

⁶³The term "project" is defined in Section 3(11) of the Federal Power Act as including "water rights . . . which are necessary or appropriate in the maintenance and operation" of the project. Since the Commission licenses the construction, operation and maintenance of project works, and since the latter are limited by Section 3(12) to "the physical structures of a project", the Commission has authority to act in the premises by issuing a license notwithstanding that the asserted water rights associated with a project are currently being challenged in court. Interior's contention that "satisfactory evidence" cannot be submitted when water rights are being challenged, is more realistically viewed as running to the applicant's ability to operate the project works and, consequently, whether a license *should* be issued.

et seq., which provides at 43 U.S.C. § 1761(a):

“The Secretary [of the Interior], with respect to the public lands and, the Secretary of Agriculture, with respect to lands within the National Forest System . . . are authorized to grant, issue, or renew rights-of-way over, upon, under, or through such lands for—

“(1) reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water;

* * *

“(4) systems for generation, transmission, and distribution of electric energy, except that the applicant shall also comply with all applicable requirements of the Federal Power Commission under the Federal Power Act of 1935. . . .”

Assuming *arguendo* that the Federal Land Policy and Management Act of 1976 gives the Secretaries of the Interior and Agriculture concurrent authority with this Commission to grant rights-of-way for water power projects through government non-Indian lands⁶⁴, it makes no change in the interrelationship between the Federal Power Act and the statutes which it replaces. Now, as then, the construction, operation and maintenance of the facilities of water supply projects which generate electric power are licensable by this Commission under the Federal Power Act rather than by the said Secretaries under prior law and the Federal Land Policy and Management Act of 1976.

⁶⁴43 U.S.C. § 1702(e) defines the term “public lands” to exclude “lands held for the benefit of Indians. . . .” Nonetheless, Interior is empowered under 25 U.S.C. §§ 323 et seq. to grant rights-of-way through Indian lands for all purposes, but 25 U.S.C. § 326 provides that such authority “shall not in any manner amend or repeal” the Federal Power Act. 25 CFR § 161.2(c) provides, in this connection, that the implementing regulations do not apply to project works which are licensable under the Federal Power Act.

The Henshaw Facilities and Water Rights

One of the most troublesome aspects of this proceeding is the fact that Lake Henshaw and Henshaw Dam are not currently licensed under the Federal Power Act together with the other facilities situated on Warner's Ranch which are associated with their operation and maintenance, including the pumping facilities. In our opinion, they should be so licensed together with the water rights which are incident thereto. And the fact that they have not been licensed greatly complicates our resolving today many of the problems associated with San Luis Rey waters which have been developing and compounding for more than a half-century.

The presiding judge found that Henshaw Dam and Lake Henshaw are part of Project No. 176, rationalizing that Section 3(11) of the Federal Power Act defines the term "project" as meaning a

"complete unit of improvement or development consisting of

- 1 a power house,
- 2 all water conduits,
- 3 all dams and appurtenant works and structures (including navigation structures) which are a part of the said unit, and all storage, diverting, or forebay reservoirs directly connected therewith,
- 4 the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system,
- 5 all miscellaneous structures used and useful in connection with said unit or any part thereof, and

- [6] all water rights, rights-of-way, ditches, dams, reservoirs, lands, or interests in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit. . . .”

and rationalizing further that the two Henshaw facilities, the diversion dam, Escondido Canal, Wohlford Dam and Lake Wohlford and the Rincon and Bear Valley power facilities are “all operated as a unit, each step is affected by the steps ahead of it.” Accordingly, he concluded that Vista must join in Mutual’s and Escondido’s application to the extent of Henshaw Dam and Lake Henshaw⁶⁵ and its utilization of the Escondido Canal.

Vista excepts to the inclusion of “Henshaw Dam, Lake Henshaw and its immediate environs surrounding the high-water mark of the reservoir basin” within a license for Project No. 176, asserting (1) that the San Luis Rey River is a non-navigable intrastate stream, (2) that Henshaw Dam and its entire impoundment area are situated on private property with the exception of a *de minimis* portion of the spillway, (3) that Henshaw Dam was not constructed for the purpose of developing power and there is no direct connection between it and the facilities of Project No. 176, (4) that the Commission in *California Aqueduct*⁶⁶ excluded

⁶⁵Apparently the presiding judge did not include the pumping facilities on Warner’s Ranch. Since they were installed to increase the volume of water impounded by Henshaw Dam they serve the same function in a water-deficient environment as increasing the height of a dam in an environment of greater water abundance. They are clearly “miscellaneous structures used . . . in connection with” Henshaw Dam and Lake Henshaw as well as the greater unit which includes all of the present Project No. 176.

⁶⁶Opinion No. 688 issued February 6, 1974, in *Department of Water Resources of the State of California and City of Los Angeles Department of Water and Power*, Project No. 2426, 51 FPC 529.

The facilities licensed in *California Aqueduct* were those directly associated with each unit for the production of power, including the storage facilities. Here, Lake Henshaw is the only storage facility directly serving the Rincon powerhouse and should, therefore, be licensed consistent with *California Aqueduct*.

from a license numerous facilities unrelated to the production of power, (5) that *Farmington*⁶⁷ precludes the issuance of a license since Henshaw Dam was lawfully constructed before 1935, and (6) "Vista as a co-licensee of the works comprising the present Project 176 would be amenable and subject to all reasonable conditions which the new license might impose on the operation of Henshaw Dam and reservoir as a headwater development."

The Commission staff contends that Henshaw Dam and Lake Henshaw should be included in a new license for Project No. 176, and the Bands and Interior agree if the Commission issues a power license to Mutual and/or Escondido.

Although Vista claims that Henshaw Dam was not constructed for the purpose of developing power, it appears that Vista's predecessors' notices of appropriation of the waters of the San Luis Rey River specifically include "developing power to be used in operating machinery for generating electricity". Construction of Henshaw Dam was begun in April or May 1922; and the agreement of June 28, 1922, between Henshaw and Interior acting on behalf of the Rincon and Pala Bands recites that "power development" was one of the purposes of the dam. Similarly, the agreement of November 10, 1922, between Mutual and Henshaw's successor, San Diego County Water Company, recites that it was contemplated that Henshaw-impounded water would be used to generate electric power.

The agreement of June 21, 1912, between Mutual and Henshaw fixed Mutual's natural flow entitlement at 4,143 acre-feet from November 1 through July 1 each year. And the agreement of November 10, 1922, between Mutual and

⁶⁷*Farmington River Power Company v. Federal Power Commission*, 455 F.2d 86 (CA2, 1972).

Henshaw's successor, San Diego County Water Company, provided in substance that Mutual would satisfy the Rincon Band's natural flow entitlement from its own natural flow entitlement, that Mutual could purchase 5,000 acre-feet for delivery in June through November each year and that Mutual and San Diego County Water Company would share the cost of enlarging and lining the Escondido Canal and operate and maintain it through a "superintendent". The canal was enlarged and lined in the 1920's, the Bear Valley powerhouse was enlarged and a third generator installed in 1928, and a joint canal superintendent's office was established. On October 1, 1941, Mutual and San Diego County Water Company granted one another reciprocal storage right in Lakes Wohlford and Henshaw, and on February 9, 1943, the latter granted Mutual the right to utilize some of its water to generate power at its Bear Valley facilities.

Henshaw Dam was completed in December 1922, and thereafter it impounded in Lake Henshaw and co-mingled the inflows from the uppermost 36% of the San Luis Rey watershed, consisting of 86% of the portion of that watershed lying upstream from Mutual's intake. The Commission staff estimates that 77% of the water arriving at the intake originates above Henshaw Dam and, conversely, that 48% of the natural flow at the intake would spill by it if it were not impounded in Lake Henshaw.

It is apparent that although Henshaw Dam and Lake Henshaw have not been and are not owned by the same legal entities as the Escondido Canal, Wohlford Dam and Lake Wohlford, all of those facilities have been operated for more than a half-century as a single undertaking to supply water for domestic and irrigation consumption to the vicinities of Escondido and Vista, California, and we so find. Henshaw Dam impounds in Lake Henshaw and co-mingles all of the upstream waters which reach it, including Mutual's and the

Rincon Band's natural flow waters and Vista's appropriated waters, and those co-mingled water are released downstream into the San Luis Rey River and are diverted into the Escondido Canal. And from 1923 to 1970, inclusive, Project No. 176 generated an average of 4,075,388 kilowatt-hours per year, compared to 1,581,990 kilowatt-hours per year from 1917 to 1922, inclusive, prior to the construction of Henshaw Dam.

Accordingly, we find from the foregoing and other events prior to, during and subsequent to the construction of Henshaw Dam, that it was constructed and has been and is being used for the purpose, among others, of generating electric power at the Bear Valley and Rincon powerhouses of Project No. 176.⁶⁸ Although Henshaw Dam, Lake Henshaw and the associated pumping facilities and water rights are generally under different ownership from the works of Project No. 176, we find that they are in fact part of the same complete unit of development as Project No. 176, "the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit," within the meaning of Section 3(11) of the Federal Power Act.⁶⁹

Farmington does not help Vista because the impact of that decision would be to preclude the Commission from requiring licensing on the ground that the Henshaw facilities are on a non-navigable headwater (the San Luis Rey River) of a navigable waterway (the Pacific Ocean). *Farmington* does not negate a licensing requirement on other grounds,

⁶⁸The presiding judge's statement that Henshaw Dam was not built "for power purposes" is inconsistent with those facts and events.

⁶⁹Since all of the water which is designated as Vista's originates above Henshaw Dam, and since some Vista-designated water is utilized to generate electric power at the Bear Valley powerhouse, there can be no question that Henshaw-impounded water is utilized to generate electric power.

such as the fact that a portion of the spillway of Henshaw Dam and the flood area of Lake Henshaw are situated within the Cleveland National Forest⁷⁰ and the fact that the waters impounded by Henshaw Dam develop water power in conjunction with the facilities of Project No. 176.⁷¹

Since Vista is required by the California Department of Water Resources, Division of Safety of Dams, to hold Lake Henshaw to 10,000 acre-feet until appropriate modifications are made to comply with current safety standards, and since any new construction would appear to bring the Henshaw facilities within *Taum Sauk*, *Farmington* appears to be of little practicable significance even assuming *arguendo* that it currently precludes the assertion of jurisdiction.⁷²

Having decided that the Henshaw facilities must be licensed under the Federal Power Act, we find that they

⁷⁰*Federal Power Commission v. Oregon*, 349 U.S. 435 (1955).

⁷¹In *Taum Sauk (Federal Power Commission v. Union Electric Co.*, 381 U.S. 90 (1965)), the Supreme Court considered the 1935 amendments to Section 23 of the Federal Water Power Act and held that "Congress has required a license for a water power project utilizing the headwaters of a navigable river to generate energy for an interstate power system." But seven years later in *Farmington* the United States Court of Appeals for the Second Circuit decided that a license is not required for a dam constructed prior to 1935 across a nonnavigable stream, rationalizing that the 1935 amendment to Section 23 made the filing of a declaration of intention mandatory with respect to any person "intending" to construct a dam or other project work in nonnavigable waters, and that such mandatory requirement had no retroactive application.

The second sentence of Section 23(b) addresses the construction of project works across, along, over or in nonnavigable waterways. Conversely, that sentence does not address the construction, operation or maintenance of project works upon the public lands or reservations of the United States. Such acts with respect to such project works are prohibited by the first sentence of Section 23(b) "except under and in accordance with the terms of a . . . license granted pursuant to this Act."

⁷²We take official notice of the fact that a document entitled "Draft Environmental Impact Report of the Modification of Henshaw Dam and Warner Ranch Ground Water Program" dated May 1978, has been submitted on behalf of Vista to the Commission for comment.

should be licensed as part of Project No. 176 and not separately, first, because they are operated with the facilities of Project No. 176 as part of a single undertaking, and second, because Vista is in law, and must become in name, a joint licensee of Project No. 176.

Vista Irrigation District

In 1924 O. C. Merrill, Executive Secretary of the Federal Power Commission, tendered to Mutual a draft of a proposed license for Project No. 176, and Mutual then informed Mr. Merrill, and furnished him a copy, of the agreement of November 10, 1922, inquiring whether that agreement conflicted with Article 22 of the proposed license, requiring Mutual to retain possession of its properties. Mr. Merrill replied that the "agreement indicates" that Mutual retained sufficient control to comply with the proposed license.⁷³

Today, with the knowledge of the ensuing half-century, we find that Vista's predecessor acquired sufficient control of Mutual's properties and their operation and maintenance that it should have been, and Vista should now become, a joint licensee of Project No. 176 with Mutual.⁷⁴

⁷³We do not agree with Mutual's, Escondido's and Vista's contention that the agreement of November 10, 1922, was thereby "approved by the FPC prior to the issuance of the license."

⁷⁴Henshaw Dam was completed in December 1922 following which, in the middle to late 1920's, the Escondido Canal was enlarged and improved, Henshaw Dam was raised, the concrete diversion dam was constructed and the Bear Valley powerhouse was enlarged and a third generator was installed, among other changes to the complete unit of development. The costs of many if not all of these changes were shared by Mutual and San Diego County Water Company, generally on a one-third/two-thirds basis, and the latter acquired a perpetual right to utilize up to two-thirds of the carrying capacity of the Escondido Canal and to store water in Lake Wohlford. The operation and maintenance of the Escondido Canal and certain related facilities were transferred to a joint canal superintendant who was chosen by the two companies but removable by either, and was subject to the control of the boards of directors of the two companies and financed in accordance with their respective volumes of water carried through the Escondido Canal. These facts, among others, establish that there was and is a comprehensive plan under which Mutual and San Diego County Water Company, and later Vista, became and are partners in the operation and maintenance of the complete unit of development which includes Project No. 176.

One aspect of Vista's predecessor's and Vista's control of Project No. 176 requires special consideration. When the license for Project No. 176 was issued in 1924, the water which was discharged from Lake Wohlford flowed through an open channel until it reached the penstock comprising the power drop to the Bear Valley powerhouse. Apparently that channel was not large enough to carry the water of both Mutual and San Diego County Water Company, for the agreement of November 10, 1922, contemplated the construction of a new larger outlet from Lake Wohlford and a sharing of the costs by the two companies equally. In 1929, a year after the Bear Valley powerhouse was enlarged, a new outlet consisting principally of a 2,521 foot-long 48-inch pipeline was constructed. And, in an agreement dated October 1, 1941, Mutual and San Diego County Water Company acknowledged

"that two-thirds of the entire cost of constructing said 48-inch pipe line was paid by [San Diego County Water Company], and one-third of such cost was paid by [Mutual]; and that [San Diego County Water Company] owns an undivided two-thirds interest in said 48-inch pipe line, and [Mutual] owns an undivided one-third interest therein.

"[San Diego County Water Company] agrees that it will pay . . . two-thirds of any and all taxes of every kind and nature levied against said 48-inch pipe line, and [Mutual] agrees that it will pay . . . one-third of any and all taxes of every kind and nature levied against said pipe line."

The rights granted to Mutual under the 1924 license include the rights to operate and maintain the channel from Lake Wohlford to the Bear Valley penstock. If an undivided proprietary interest in that channel did not lodge in San Diego County Water Company in 1929, such an interest was certainly transferred from Mutual to San Diego County

Water Company on October 1, 1941. In either case, Article 22 of the license was violated. And in either case, the ownership of an undivided interest in the channel by San Diego County Water Company and, later, by Vista, is inconsistent with Mutual's exclusive rights as sole licensee to operate and maintain the channel.⁷⁵

Section 8 of the Federal Power Act provides,

"That no voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the Commission; and any successor or assign of the rights of such licensee . . . shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this Act to the same extent as though such successor as assign were the original licensee hereunder. . . ."

While Vista now consents to becoming a joint licensee under a new license for Project No. 176, we have investigated under Section 4(g) of the Federal Power Act and find that Vista's predecessor was in law at least from 1941, and Vista has been in law since 1946 when it succeeded to the interests of San Diego County Water Company, a joint licensee with Mutual of Project No. 176. Vista has been and is subject to all the provisions and conditions of the Federal Power Act to the same extent as though it were a licensee of Project No. 176 and, as a result, it is subject to the Commission's orders, including orders pertaining to its Henshaw facilities and water rights which are part of the complete unit of development embracing Project No 176.

⁷⁵ Additionally, Mutual and Vista are joint owners of a 1928 easement across the Cuca Ranch providing access to the diversion dam, and it is stipulated that one of the two penstocks currently leading to the Bar Valley powerhouse is *owned* by Vista.

City of Escondido, California

Escondido has been attempting since 1963 to acquire either Mutual or its assets, and its most recent effort by which Escondido hopes to acquire and then dissolve Mutual was restrained temporarily in 1971 by the United States District Court for the Southern District of California. Although that court is no longer restraining Escondido's acquisition and dissolution of Mutual, it has indicated that it will not allow a distribution of proceeds until the litigation is adjudicated on the merits. In view of the uncertainties of that consolidated litigation and this consolidated proceeding, Escondido has not consummated its acquisition and dissolution of Mutual.

It is not disputed that any new license which may be issued to Mutual must be transferred to Escondido if the latter is to consummate its plan. But a question arises as to whether any new license which may be issued to Mutual can and should also be issued to Escondido as a joint licensee in the light of the latter's application to assume such a status now.

Licenses are issuable under the Federal Power Act to corporations and municipalities, among others, for the purpose of constructing, operating and maintaining project works and, as a result, Escondido can be licensed as a joint licensee only if it engages or proposes to engage in one or more of those activities with respect to Project No. 176.⁷⁶

Mutual is managed, under arrangements approved by the District Court, by a Board of seven directors of whom five

⁷⁶Unlike certain other statutes, such as the Securities Act of 1933 and the Securities and Exchange Act of 1934, the licensing provisions of the Federal Power Act do not include concepts of beneficial ownership. Accordingly, the parent of a wholly-owned subsidiary licensee is not required to obtain a license by reason of its status as a parent.

consist of the members of Escondido's governing body, and two represent Mutual's minority shareholders. Escondido is committed under those arrangements to make payments to Mutual to the extent that Mutual's expenses (excluding depreciation) exceed its revenues, so that Mutual will not have a profit nor incur a loss from its operations, including the operation and maintenance of Project No. 176. Escondido is also committed to make payments to Mutual to the extent that (1) additions and betterments (including contributions), less (2) retirements, plus (3) revenues in excess of expenses, are less than (4) the amount of depreciation. The total arrangement appears to be designed to preclude Mutual's financial status from changing.

While Escondido is not required to obtain a license by reason of its proprietary control of Mutual, its several attempts to acquire Mutual or Mutual's properties and the foregoing arrangements show clearly that Escondido's proposal to operate and maintain Project No. 176 is bona fide. We find, in this connection, that Escondido's failure to consummate its acquisition and dissolution of Mutual is reasonable in the light of the uncertainties attending the consolidated litigation in the District Court and this consolidated proceeding. Additionally, we find nothing prejudicial in licensing Escondido now as a joint licensee.⁷⁷

⁷⁷Mutual is an investor-owned "corporation" within the meaning of Section 3(3) of the Federal Power Act, and, as such, it is not a "municipality" within the meaning of Section 3(7), such as both Escondido and Vista. Section 7(a) of the Federal Power Act requires the Commission to give preference to applications by States and municipalities "in issuing licenses to new licensees" under Section 15, provided, that the respective plans are or will within a reasonable time be equally well adapted. The application of Section 7(a) to a situation involving joint applicants consisting of a "corporation" (Mutual) and a "municipality" (Escondido) is hotly contested herein. But since Vista is a "municipality" and must in any event become a joint licensee with Mutual, if a license is issued to Mutual, Escondido's status as a joint licensee with

Indeed, such action will obviate the need to transfer the license at a later time.⁷⁸

Finally, Escondido will not have to stipulate, as indicated by the presiding judge, that (1) it will not claim the exemption from takeover under Section 14 provided by the Act of August 15, 1953, or (2) it will not assert its municipal preference under Section 7(a). Since takeover by the United States is *always* possible either under Section 14 or by condemnation, a license which includes Escondido as a licensee does not, in effect, grant a perpetual easement which amounts to a disposition of Indian reservation lands.⁷⁹

Mutual and Vista would not change the applicability or inapplicability of Section 7(a).

Similarly, the Act of August 15, 1953, (16 U.S.C. § 828), provides that Sections 4(b), 14, 301 and 302 of the Federal Power Act "shall not be applicable to any project owned by a State or municipality". Since Vista owns an undivided interest in the 48-inch pipeline which currently is part of Project No. 176, and since it also owns the Henshaw facilities which are part of the complete unit of development which includes Project No. 176, Escondido's status as a joint licensee with Mutual and Vista would not change the applicability or inapplicability of the Act of August 15, 1953.

⁷⁸Additionally, we have raised and considered the question of whether the joint canal superintendant, which is stipulated as being a "separate entity", should be licensed as operator of Project No. 176 jointly with, or in lieu of, others. Unlike the situation in Opinion No. 620, *El Paso Natural Gas Company*, 47 FPC 1527 (1972), the Commission could not discharge its regulatory responsibilities by licensing the joint canal superintendant alone since that entity operates only some of the facilities of the complete unit of development. And licensing that entity with others would not help the Commission to discharge its responsibilities since the other joint licensees possess the ultimate total regulatory responsibility and are the source of the ultimate total regulatory responsiveness.

⁷⁹The presiding judge apparently was unaware that the purpose of Section 14 is to provide a formula for payment rather than to confer a right of acquisition. Similarly, he was apparently unaware that the purpose of the Act of August 15, 1953, was to change that formula in cases of States and municipalities, as discussed *infra* under FEDERAL TAKEOVER NOT RECOMMENDED. Furthermore, the conclusion in the immediate preceding section that Vista is subject to all the provisions and conditions of the Federal Power Act, and the interpretation *infra* that the Act of August 15, 1953, applies to interests in projects owned by States and municipalities, moot the perpetual easement issue discussed by him.

Furthermore, Section 7(a) does not preclude the Commission from issuing a license other than to a State or municipality in a situation in which the Commission finds that the competing plans are better adapted to conserve and utilize in the public interest the water resources of the region, and the plans of the State or municipality cannot be made equally well adapted within a reasonable specified period of time. And, as a result, Section 7(a), either alone or in conjunction with Section 14, does not, in effect, grant a perpetual easement to a State or municipality which amounts to a disposition of Indian reservation lands.

THE BANDS' LICENSE APPLICATION IS DENIED

Mutual and Escondido propose to continue to operate Project No. 176 under a new power license in essentially the same manner as that project has been operated for more than a half-century, diverting an annual average of 14,600 acre-feet of San Luis Rey water into the Escondido Canal for conveyance to and consumption in the Escondido and Vista areas. The Bands, on the other hand, view that San Luis Rey water as being rightfully theirs under the Winters doctrine⁸⁰; and they propose to operate Project No. 176 under a nonpower license in such a manner as to bring approximately 200 acres of their reservation lands under irrigation each year until they are able to utilize all of the San Luis Rey water which they consider theirs. While there are other differences between the competing proposals, the

⁸⁰*Winters v. United States*, 207 U.S. 564 (1908). As most recently explained in *United States v. New Mexico*, — U.S. — (1978), (Slip Opinion, page 3),

“The Court has previously concluded that Congress, in giving the President the power to reserve portions of the federal domain for specific federal purposes, *impliedly* authorizes him to reserve ‘appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.’ ”

conflict focuses principally upon whether the water should be permitted to leave the San Luis Rey watershed as in the past and currently, or whether it should be placed under Indian control and kept within that watershed.⁸¹

The presiding judge indicated that a nonpower license should not be issued to the Bands on the ground that they had not established their right to the consumptive use of the San Luis Rey water, stating,

“[W]ithout the water, the Indians have no project at all, and upon that basis alone . . . it must follow that the application for a nonpower license is required to be denied.”

As a result, he did not consider the finding which is required by Section 15(b) of the Federal Power Act that “in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or any part of [the] licensed project should no longer be used or adapted for use for power purposes.”

The Bands and Interior contend on exception that the Bands’ proposal for a nonpower license is superior to Mutual’s and Escondido’s proposal for a power license, but they largely ignore that requisite statutory finding. Instead, they argue (1) that “the San Luis Rey can now fulfill the same function for the Bands as it once did for Vista and Escondido” by making those cities economically sound, vital and growing communities, (2) that Mutual’s shareholders rather than the public would be the primary beneficiaries of a power license to Mutual, (3) that the greater parts of Escondido’s and Vista’s water supplies are used for higher-rate domestic consumption and as a result their water

⁸¹Until the water is needed for irrigation of their reservation lands, the Bands would sell it presumably to Mutual, Escondido and/or Vista and thereby export it from the San Luis Rey watershed.

users can afford more-expensive alternative supplies, (4) that Lake Wohlford will be improved as a fishery since its elevation would no longer fluctuate for water storage and the La Jolla Indian Reservation fishery will also be improved since, "We would seek to schedule releases from Lake Henshaw so as to maximize fishery benefits", (5) that Indian reservations cannot be converted or transferred to the use and benefit of non-Indians under the guise of the Federal Power Act, (6) that Mutual has abused its license and (7) that the reasons cited by the presiding judge for denying jurisdiction make Project No. 176 a "perfect candidate" for the Commission's first nonpower license.

Parameters of a Nonpower License

The Bands' case for a finding that "all or any part of [the] licensed project should no longer be used or adapted for use for power purposes" initially was premised upon a 1962 evaluation report which was prepared for Mutual in connection with the 1963 agreement in principal to sell Mutual's assets to Escondido. That report indicated that the direct expenses of the Rincon power plant exceeded its revenues, and the return on the Bear Valley power plant would not pay the interest on its replacement cost. Later information in the record indicates, however, that the revenues from the two power plants were expected to exceed their operation and maintenance costs by a healthy margin during the 1973-74 period in view of sharply rising fuel costs and resulting power rates, and the fact that water power plants utilize no fuel.⁸²

⁸²As the arguments point out, most of the generating equipment involved herein is more than 60 years old and could break down irreparably at any time or continue functioning through the life of another license. So long as they are functioning and not proposed to be replaced, it is premature to consider questions pertaining to their possible replacement.

We take official notice, in this connection, of Mutual's Form 1-F

The fact that water power plants utilize no fuel weighs heavily against a finding that the Rincon and/or Bear Valley power plants, or any other part of Project No. 176 which supplies water to those facilities, should no longer be used or adapted for use for power purposes. Water is a renewable resource, and the emerging national energy policy favors greater utilization of all renewable resources for the production of electric energy. One of the purposes of the Department of Energy Organization Act is "to place emphasis on the development and commercial use of solar, geothermal, recycling and other technologies utilizing renewable energy resources." 42 U.S.C. § 7112(6). And Title IV of the Public Utility Regulatory Policies Act of 1978 provides for the establishment of a program to encourage the development of small water power projects in connection with existing dams which are not being used to generate electric power.⁸³

reports for the years ended June 30, 1975, 1976 and 1977, from which the following figures pertaining to sales of electricity are taken:

	<u>1975</u>	<u>1976</u>	<u>1977</u>
Kilowatt-hours	2,869,500	3,124,100	2,936,300
Operating revenues	\$ 83,615	\$ 97,148	\$ 100,976
Operating expenses	<u>\$ 45,415</u>	<u>74,672</u>	<u>45,961</u>
Net operating income	\$ 38,200	\$ 22,476	\$ 55,015

⁸³An April 1978 Commission publication entitled "Water Power" states,

"Hydroelectric plants depend upon water, which is a renewable resource because of the recurring cycles of rainfall, runoff, and evaporation. Hydroelectric plants do not consume water, heat the water of streams, or contribute to air pollution. These favorable characteristics, combined with increasing shortages and costs of fossil fuels, make hydroelectric power an increasingly attractive choice as a source of electric power generation."

The same publication indicates that a recent study identified 47,000 dams in the United States which are 25 feet or higher at which no electricity is generated, although 54,100 megawatts of generating capacity could be developed at those dams. And it also indicates that the Department of Energy has been appropriated \$10,000,000 for research,

(footnote continued on following page)

As indicated, the generation of electric power is and always has been incidental to the primary purpose of Project No. 176 of conveying water for domestic and irrigation consumption, and the power generated by the project is and always has been unimportant to SDG&E. Nonetheless, if Project No. 176 were to cease generating electric power SDG&E would thereby be forced to obtain approximately 4,000,000 kilowatt-hours annually from other sources. And the most likely sources would require the consumption of fossil fuels consisting of 6,340 barrels of fuel oil or 37,800 Mcf of natural gas annually, or some combination of the two.

In view of the fact that the electric operating revenues are exceeding the electric operating expenses of Project No. 176, and in view of the emerging national energy policy favoring greater utilization of renewable resources in generating electric power, we are unable to find in conformity with a comprehensive plan for beneficial public uses that any part of Project No. 176 should no longer be used or adapted for use for power purposes.⁸⁴

development and demonstration focusing upon low head (less than 65 feet) hydroelectric power, to supplement the high head power which characterized this country's hydroelectric development during the first half-century under the Federal Power Act.

In addition, and in furtherance of national policies for conserving fossil fuels, the Commission, in Order No. 11 issued September 5, 1978, adopted a simplified procedure and format for processing applications for certain small-scale hydroelectric projects.

⁸⁴As indicated, however, Mutual and Escondido propose the construction of 8,550 feet of 48-inch pipeline principally on non-reservation lands, a sequential abandonment of approximately 12,000 feet of conduit on the eastern portion of the San Pasqual Indian Reservation and the restoration of the abandoned right-of-way. Since the license issued herein requires the Licensees to provide water to the eastern portion of the San Pasqual Indian Reservation, the San Pasqual Band might wish to utilize the 12,000 feet of conduit to convey water through that portion of its reservation instead of having the abandoned right-of-way restored.

Apparently the Bands recognize that it would be imprudent to attempt to persuade the Commission to scrap functioning and useful generating facilities utilizing a renewable resource, no matter what their age. As a result the Bands say that they will maintain the Rincon and Bear Valley power plants until a major breakdown occurs, and then they will sell those facilities for scrap. We find that their plan to continue generating power is inconsistent with the concept of a nonpower license.⁸⁵

A nonpower license is a temporary license which is intended to fill the regulatory gap between the time the Commission orders that all or part of any licensed project should no longer be used or adapted for use for power purposes, and the time some other regulatory body assumes regulatory supervision of the lands and facilities included under the license. Timewise, it is of indefinite duration; and powerwise, it requires the termination of all usefulness for power purposes at or prior to the time of its termination.⁸⁶ The Bands propose to continue to generate electric power even after regulatory supervision would pass to Interior and, as a result, they cannot have a nonpower license.⁸⁷

⁸⁵Their plan for irrigation is also inconsistent with that concept. The Bands speak of developing water power on a conduit which they would construct north of the San Luis Rey River to convey irrigation water. Because that conduit would occupy public lands and reservations of the United States, the Bands would be precluded by Section 23(b) from constructing, operating and maintaining those water power facilities without a license under the Federal Power Act.

⁸⁶As recommended by the Federal Power Commission and as introduced in both the House and the Senate, the bill which eventually became Section 15(b) in 1968 contained the sentence, "Licenses for nonpower use shall be issued on condition that any existing power facilities shall be removed or otherwise disposed of as directed by the Commission." The sentence was deleted in what was characterized as a technical and clarifying amendment.

⁸⁷If the Bands were to continue to generate electric power after a nonpower license is terminated, they would violate Section 23(b) which prohibits them, for the purpose of developing electric power, from operating and maintaining the Escondido Canal and the Rincon powerhouse, among other project works, upon the public lands or reservations of the United States without a license under the Federal Power Act.

Water Rights (Article 28)

A nonpower license will not be issued to the Bands because we are unable to find that any part of Project No. 176 should no longer be used or adapted for use for power purposes, and because the Bands' proposal to continue generating power is inconsistent with the concept of a nonpower license. Because of the absence of judicial and Commission precedent with respect to nonpower licenses, and because the Bands' proposal is consistent with the concept of a power license,⁸⁸ we will treat their application as one for a power license and address its merits from that viewpoint. What is said, however, also addresses the merits of their application from the viewpoint of a nonpower license and, as a result, we find on the merits of the Bands' application that neither a power license nor a nonpower license should be issued to them.

Furthermore, we find it unnecessary to address every aspect of the merits.⁸⁹ With respect to both power and nonpower licenses, the Commission is required to consider the prospective ability of the applicant or applicants to carry out the comprehensive plan for beneficial public uses which is proposed in the application. The presiding judge addressed some of the underlying considerations, such as the availability of capital, personnel and technical resources. We agree in substance with the presiding judge that the

⁸⁸As noted, the Bands would sell surplus water presumably to Mutual, Escondido and/or Vista until it is needed for irrigation of their reservation lands and, as a result, Project No. 176 water presumably would be available at the Bear Valley power plant for many years. Furthermore, since water delivered to the Rincon Indian Reservation ordinarily passes through the Rincon power plant, the Bands' proposal is easily conditioned upon the continued generation of electric power at one or both of those facilities.

⁸⁹*Deep South Broadcasting Company v. Federal Communications Commission*, 278 F.2d 264, 266 (CA-DC, 1960).

Bands must surmount a serious water rights obstacle in establishing their ability to carry out their ambitious irrigation program, and that their application should be denied on the merits for that reason.

The water rights issue centers upon the interaction of Sections 9(b)⁹⁰ and 27⁹¹ of the Federal Power Act. The Commission must satisfy itself as contemplated by Section 9(b) that applicants for water power licenses have whatever rights are necessary to utilize the water in question in the manner contemplated by their applications and, ultimately, in the manner required by the resulting licenses. But the Commission has taken the position at least since 1932 that in view of Section 27 the Commission "has no jurisdiction to adjudicate private rights to the use of water or property where such rights or property, as in the case of the right to use water for irrigation, is vested in the jurisdiction of the State." *East Bay Municipal Utility District*, 1 FPC 12, 13 (1932).

The Supreme Court said, in this connection, in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), at page 178,

" . . . [The] Commission will not act as a substitute for the local authorities having jurisdiction over such questions as the sufficiency of the legal title of the applicant to its riparian rights. . . . Section 9(b) says that the Commission may wish to have 'satisfactory evidence' of the progress made by the applicant toward meeting local requirements but it does not say that the

⁹⁰Footnote 58, *supra*.

⁹¹Section 27 provides,

"That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

Commission is to assume responsibility for the legal sufficiency of the steps taken."

The Bands' and Interior's position on exception is not clear. At one point they suggest finessing the water rights issue through a license which would permit the Bands to operate and maintain the Escondido Canal. They indicate that Mutual and Vista could not exercise their respective water rights under such a license since they (Mutual or Vista) would not have facilities, without the Bands' consent, to convey San Luis Rey water to their service areas. Such a suggestion, however ignores (1) the Commission's obligation contemplated by Section 9(b) to satisfy itself that the prospective licensees have the necessary water rights, and (2) that water rights incident to a project are paid for by, and, consequently, are transferred to the new licensees of the project.⁹² In any event, the project which is best adapted to a comprehensive plan for beneficial public uses would exclude an arrangement, such as the one suggested, which might result in a standoff between those having water rights and those having conveyance rights.

The Bands' and Interior's foregoing suggestion highlights the untenability of the Bands' application for a license. They contend that irrigation of the Bands' reservation lands is best adapted to a comprehensive plan and, if they are right, it is obvious (1) that the Bands must have irrigation waters

⁹²Section 3(11) defines the term "project" as including all water rights, the use of which are necessary or appropriate in the operation of the complete unit of development. Section 15(a) authorizes the Commission to issue new licenses to new licensees under certain circumstances on the condition that the new licensees pay the amounts specified in Section 14(a) in the case of takeover by the United States. And Section 14(a) requires the payment of the "net investment of the licensee in the "project . . . not to exceed the fair value of the property taken", plus severance damages; and it specifies that "the values allowed for water rights" shall not "be in excess of the actual reasonable costs thereof at the time of acquisition by the licensee."

available during the summer agricultural months to carry out their program, and (2) that the Bands must gain control of the Henshaw facilities together with the water rights which are incident to those facilities in order to obtain such summer irrigation waters. Accordingly, if a new license for the existing Project No. 176 is issued to the Bands, they would pay Mutual for, and acquire by license, the water rights which are incident to the existing Project No. 176. Those are Mutual's predecessor's rights to the appropriated 100,000 miners inches of natural flow,⁹³ limited by the Rincon Band's appropriated rights and possibly other rights claimed by the Bands. Assuming *arguendo* that the Bands could also acquire by license Vista's Henshaw facilities and the incident water rights, Vista is a municipality and, therefore, we would construe Section 15(a) and the Act of August 15, 1953 (see Federal Takeover Not Recommended), as requiring the Bands to pay Vista just compensation, as distinguished from net investment plus severance damages. As a result, the Bands would have to pay a substantial amount, if they can obtain the funds, in order to acquire by license the summer irrigation waters which are the *sine qua non* of their proposed agricultural program.⁹⁴

It is possible, of course, to give the Bands access to summer irrigation waters by issuing a license to them jointly with Vista and requiring Vista to bring Henshaw Dam, Lake Henshaw and the associated pumping facilities and water rights into the ambit of the license. But such an arrangement

⁹³As noted, they have been quantified at 4,143 acre-feet annually from November 1 through the following July 1.

⁹⁴Since nonpower licenses are limited to licensed projects and parts of licensed projects, and since Vista's Henshaw facilities and the incident water rights are not currently part of Project No. 176, a nonpower license could not possibly provide the Bands with summer irrigation waters.

hardly seems workable and, in any event, it cannot be best adapted to a comprehensive plan for beneficial public uses, in view of the inherent conflict between Vista's interest in diverting the San Luis Rey waters into the Escondido Canal for export from the watershed and the Bands' interest in retaining them within the San Luis Rey watershed.

The Bands and Interior assert on exception that in terms of the application of Section 27 to this case, the two most important cases construing that provision are *Portland General Electric Co. v. Federal Power Commission*, 328 F.2d 165 (CA9, 1964)⁹⁵ and *Scenic Hudson Preservation Conference v. Federal Power Commission*, 453 F.2d 463 (CA2, 1971). In *Scenic Hudson* it was argued that a proposal to construct an underground powerhouse endangered the Catskill Aqueduct system, one of three systems which supply New York City with substantially all of its water, and that such endangerment interfered with New York City's control of the Catskill Aqueduct system and was, therefore, prohibited by Section 27. The Second Circuit noted that the Commission's license did not authorize diversion of the city's water or interference with a particular aqueduct tunnel; and in that context, and without analysis, it quoted with approval the Ninth Circuit's statement in *Portland General Electric*, 328 F.2d, at page 176,

⁹⁵In *Portland General Electric* it was argued that Section 27 precluded the Commission from including in a license two articles which imposed navigation conditions in exercise of the Commission's authority under Section 11. The Ninth Circuit said that Section 27, like Section 8 of the Reclamation Act of 1902, was a general provision preserving state law which could not override other specific provisions of the Federal Power and Reclamation Acts and, consequently, Section 27 did not preclude the Commission from exercising its power specifically vested by Section 11. The Ninth Circuit then said that Section 27 preserved to holders of state-conferred water rights a right to compensation if those rights are taken or destroyed as an incident to the exercise by another, of a license granted by the Commission.

"The only purpose of section 27 is to preserve to holders of state-conferred water rights a right to compensation if those rights are taken or destroyed as an incident to the exercise by another, of a license granted by the Commission." (Emphasis by the Bands and Interior.)⁹⁶

Of importance to this proceeding, the Supreme Court in *California v. United States* traced the legislative history of Section 8 and said, (Slip Opinion, at page 18),

"The [reclamation] projects would be built on federal land and the actual construction and operation of the projects would be in the hands of the Secretary of the Interior. But the Act clearly provided that state water law would control in the appropriation and later distribution of the water."⁹⁷

If today unappropriated waters were available in the San Luis Rey River, and if Mutual were to appropriate those

⁹⁶The Ninth Circuit indicated by footnote that it relied upon *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 291 (1958) and *City of Fresno v. California*, 372 U.S. 627, 629-30 (1963), which cases construed the substantially identical Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383.

"[N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the law of any States or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested rights acquired thereunder. . . ."

In *California v. United States*, — U.S. —, decided July 3, 1978, the Supreme Court disavowed certain dictum statements in *Ivanhoe* and *City of Fresno* pertaining to Section 8 of the Reclamation Act, but also reaffirmed the authoritative precedent of those decisions.

⁹⁷The Supreme Court also said in a footnote (Slip Opinion, at page 22),

"In previous cases interpreting § 8 of the 1902 Reclamation Act, however, this Court has held that state water law does not control in the distribution of reclamation water if inconsistent with other congressional directives to the Secretary. See *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958); *City of Fresno v. California*, 372 U.S. 627 (1963). We believe that this reading of the Act is also consistent with the legislative history and indeed is the preferable reading of the Act."

waters under California law under conditions which would require Mutual to convey those waters to Escondido for domestic and irrigation consumption, and if the Commission were to determine pursuant to Section 10(a) that the project which is best adapted to a comprehensive plan for beneficial public uses would require delivery of those waters to the Bands, the Commission would be confronted with a direct conflict between California water law and the Federal Power Act. But no party has called to our attention any requirement of California law that the waters appropriated by Mutual's and Vista's predecessors be delivered to the Escondido and Vista service areas. While *California v. United States* suggests that such a conflict must be resolved in favor of the Federal Power Act,⁹⁸ we are unaware of any reason in law or fact why we could not make such a Section 10(a) determination in favor of the Bands if the merits of the situation so require.⁹⁹

⁹⁸ Accord, *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), wherein the Supreme Court said, 328 U.S., beginning at page 167.

"In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the States from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. . . . Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. In fact a contrary policy is indicated in §§ 4(e), 10(a), (b) and (c), and 23(b). In those sections the Act places the responsibility squarely upon federal officials and usually upon the Federal Power Commission." (Footnote omitted.)

⁹⁹ The Bands and Interior argue that the "Commission has no choice other than to issue a new license to the original licensee" if water rights incident to a project are protected by Section 27. We believe, however, that their argument (1) assumes that any new license which includes Mutual as a licensee will necessarily require Project No. 176 to be operated in essentially the same manner as it is currently operated, and (2) confuses two issues, (a) the identity of the new licensee(s) and (b) the parameters of the comprehensive plan for beneficial public uses.

The Supreme Court quoted Congressman Mondell with approval (Slip Opinion, at page 23),

“ ‘Every act since that of April 26, 1866, has recognized local laws and customs appertaining to the appropriation and distribution of water used in irrigation, and it has been deemed wise to continue our policy in that regard.’ ”

The legislative history of Section 27 of the Federal Power Act clearly indicates that it was derived from Section 8 of the Reclamation Act to assure that the same policy would become part of the Federal Water Power Act.¹⁰⁰

We turn then to the Bands' and Interior's contention that Mutual and Escondido cannot satisfy the requirements of Section 9(b) because Mutual cannot provide “satisfactory evidence”, in view of the Bands' water rights claims, that Mutual has the water rights which are necessary to carry out its joint proposal with Escondido. Although the Bands

Their implied assumption is incorrect because a new license including Mutual could, in effect, require the licensees to provide water to carry out the Bands' agricultural program, and a new license to the Bands could require them to operate the project as at present for the benefit of the inhabitants of the Escondido and Vista service areas. The Bands and Interior therefore argue correctly that any new licensee(s) of Project No. 176 will acquire by license the water rights which are incident to that project, but questions pertaining to what the new licensee(s) will be required to do with those water rights will depend upon other considerations, such as Commission determinations under Section 10(a), the parameters of the water rights (particularly if the water covered by them has any required destination under State law) and possible conflicts between State law and the Federal Power Act.

The Bands' and Interior's assumption, and their confusion of the two issues, is understandable, however, in view of the fact that the competing groups of applicants in this proceeding advocate markedly different comprehensive plans which are closely associated with their respective interests, and the assumption that under such circumstances a license would best be issued to the group which is more closely associated with the comprehensive plan which is ultimately developed.

¹⁰⁰51 Cong. Rec., August 15, 1914, page 13816; 51 Cong. Rec., August 20, 1914, page 14067; *First Iowa*, *supra*, footnote 20, 328 U.S., beginning at page 176.

and Interior expressly "acknowledge that the Commission is without jurisdiction to adjudicate the merits of the existing water rights controversy between the Bands and Mutual and Vista", nonetheless, they seem to say indirectly that the Commission is bound to do so to satisfy itself that the prospective licensees have the necessary water rights.¹⁰¹

As to Mutual, the record contains evidence to the effect that in the 1890's Mutual's predecessor complied with California law with respect to the appropriation and diversion of a substantial portion of the San Luis Rey waters. Furthermore, Mutual and its predecessor had in fact appropriated and diverted those waters for almost 30 years, and Mutual was continuing to do so, when the Federal Power Commission in 1924 issued the initial license for Project No. 176. The Commission found, and said in the license, that

"the Licensee has submitted to the Commission satisfactory evidence of its compliance with the laws of the State of California as required by Section 9, subsection (b) of the Act, and the Commission is satisfied as to the ability of the Licensee to carry out the plans for said project as filed with said application. . . ."

And finally, there is no suggestion that Mutual's water rights are limited in time or otherwise, so as to prevent Mutual from operating and maintaining Project No. 176 for another term except insofar as those rights may be limited by some future court decision in the pending litigation concerning them.

¹⁰¹We find that many of the arguments are directed toward imposing license conditions for providing water to the Bands, rather than to the broad issue posed by the Bands and Interior.

As to Vista, the record contains evidence to the effect that in the 1910's Vista's predecessor also complied with California law with respect to the appropriation and diversion of a substantial portion of the San Luis Rey waters. Furthermore, Vista and its predecessor have in fact appropriated and diverted those waters for more than 50 years, and Vista is continuing to do so without possessing any Federal license other than a permit to occupy a small portion of the Cleveland National Forest. And, as in the case of Mutual, there is no suggestion that Vista's water rights are limited in time or otherwise, so as to prevent Vista from operating and maintaining Project No. 176 for the term of a new license, except insofar as those rights may be limited by some future court decision in the pending litigation concerning them.

Under such circumstances, we find that Mutual and Vista have submitted to the Commission satisfactory evidence of their compliance with the laws of the State of California as required by Section 9(b). Insofar as concerns their rights to water, we are satisfied as to their ability to operate and maintain Project No. 176, subject to the terms and conditions of the new license, except insofar as those rights may be limited by the ultimate disposition of the pending litigation. The Bands base their claims to that water, not upon compliance with the laws of the State of California,¹⁰² but upon the Winters doctrine and other laws which they said void certain agreements pertaining to that water. Those unlitigated claims do not preclude us from continuing to be satisfied with the evidence submitted by Mutual and Vista pursuant to Section 9(b). Accordingly, and insofar as con-

¹⁰²Other than the Rincon Band of Mission Indians, which complied with the laws of the State of California with respect to the appropriation and diversion of a small portion of the San Luis Rey waters.

cerns their rights to water, the Bands will not be in a position to nullify that evidence and submit their own evidence of having the necessary water rights to carry out the comprehensive plan for beneficial public uses which is proposed in their application until they are able to submit a document finally disposing of the pending litigation in their favor. The Commission was not intended to be, and is not, a forum for litigating disputed water rights.¹⁰³

Since Mutual's license for Project No. 176 was issued for the maximum lawful term and expired almost five years ago, and in view of other considerations, we find that it is not in the public interest to defer action on the pending applications until final resolution of the pending litigation concerning the water rights incident to that project. Accordingly, we are issuing a new license and are including in Article 28 a broad condition which authorizes any modifications considered appropriate by the Commission in conjunction with or following the final disposition of the pending or any substituted litigation involving the water and related contractual rights which are incident to Project No. 176.

Water is a scarce commodity in Northern San Diego County and must be conserved, and the Bands cannot utilize immediately on their reservations all or even a substantial part of the San Luis Rey water which is currently diverted to the Escondido and Vista service areas. As a result, it is assumed that any redirection of the ultimate destination of that water which might be required by the disposition of the pending litigation should take place over an extended period

¹⁰³In *First Iowa, supra*, the Supreme Court emphasized that while Section 27 saves State law as to property rights to water, Section 9 is devoted to securing adequate information for the Commission to act on pending applications for licenses. There is an extended discussion of the two sections at 328 U.S. 175-82.

of time, as in the case of the Bands' and Interior's proposals in this proceeding. Article 28 is intended to accomodate the necessary adjustments within the framework of the license issued by this Opinion and order to Mutual, Escondido and Vista.

FEDERAL TAKEOVER NOT RECOMMENDED

Section 7(c) of the Federal Power Act provides, in addition to Section 14 (see Footnote 9),

“Whenever, after notice and opportunity for hearing the Commission determines that the United States should exercise its rights upon or after the expiration of any license to take over any project or projects for public purposes, the Commission shall not issue a new license to the original licensee or to a new licensee but shall submit its recommendation to Congress together with such information as it may consider appropriate.”

Furthermore, § 16.9 of the Commission's Regulations Under the Federal Power Act, 18 CFR § 16.9, provides,

“If the Commission, after notice and opportunity for hearing concludes upon departmental recommendation, a proposal of any party, or its own motion, that the standards of Section 10(a) of the Act would best be served if a project whose license is expiring is taken over by the United States, it will issue its findings and recommendations to this effect, and . . . forward copies of its findings and recommendations to the Congress.”

As discussed more fully in the following sections of this Opinion and order, an evaluation under the standards of Section 10(a) of the Federal Power Act has been made with respect to resource conservation, water quality, recreation, fish and wildlife, flood control and economic considerations. And, as a result of that evaluation, the Commission finds (1) that Project No. 176 is best adapted to compre-

hensive development of the San Luis Rey and Escondido Canal and Creek waterways upon compliance with the terms and conditions of the power license issued herein, and (2) that any useful objectives obtained by takeover of Project No. 176 or a part thereof are outweighed by operation and maintenance of the project by Mutual, Escondido and Vista and, consequently, that the public interest is best served through issuance of the license. *Pacific Gas and Electric Company*, Project No. 619, 52 FPC 1898, 1901 (1974).

While the power license issued herein is different from that sought by Mutual and Escondido, and includes Vista's property against its will, and gives the Bands and Interior less than they want, we believe that on balance it provides the best possible workable plan for the available water supply in the light of all the competing interests. We know of no reason why takeover by the United States would better serve the standard of Section 10(a) and, therefore, takeover of Project No. 176 is not recommended to Congress.

The consideration resulting in our decision not to recommend takeover by the United States are the same as those resulting in our rejection on the merits of a power or non-power license for the Bands, and those resulting in the special license conditions which give shape and dimension to the comprehensive plan for beneficial public uses which is developed herein. As stated in the Bands' and Interior's brief on exceptions,

"Interior's proposal in the event of recapture will accomplish the same overall purposes as the Bands' application for a nonpower license. The Bands' application is more in keeping with contemporary Indian policy, specifically the policy of Indian self-determination. . . . In the judgment of the Interior Department, the Bands should have primary responsibility for operating and managing the project; it should be run by

them, not for them, with the BIA available to provide technical and other assistance as needed."

The foregoing statement appears to contradict Interior's recommendation of May 22, 1972, as supplemented October 18, 1972, which advocates that the United States rather than the Bands should operate the recaptured portion of the project, and that the project should be operated "for the benefit of all who have a right to use the water therefrom" rather than for the benefit of the Bands as such.

The Escondido area has relied upon the availability of San Luis Rey water for more than 80 years, and the Vista area, for more than 50 years. If Congress enacts legislation to authorize Interior to take over Project No. 176 or a portion of the project, Congress will in effect take that long-established water resource from those areas and confer it upon the Bands.¹⁰⁴ Interior has not indicated the standards which were applied in reaching its decision to recommend such action and, as has been shown, there appears to be a conflict between Interior's 1972 proposal and its current justification that its Bureau of Indian Affairs has a fiduciary relationship to the Bands and to Indians generally, and that it is attempting to carry out congressionally mandated objectives of Indian-oriented legislation. Whatever standards Interior may have applied, the Bands and Interior have failed to persuade us that the standards of Section 10(a) would best be served through takeover pursuant to Interior's recommendation or most recently stated justification.

The presiding judge in effect applied the standards of Section 10(a) and concluded that "there is no need for, and so no occasion to recommend federalization by act of Con-

¹⁰⁴ Additionally, and contrary to our national energy policy, Congress will in effect authorize the termination of the production of power from a renewable resource at the Rincon powerhouse.

gress." The Bands and Interior take exception; and since Interior has recommended takeover of part of Project No. 176, it is necessary to address the relevant issues.

In view of the fact that Section 14(a) of the Federal Power Act speaks of taking over "any project or projects . . . covered in whole or part by the license", we have considered whether recapture of only part of a project is permissible. And in view of the fact that Vista is a "municipality" and owns a part of Project No. 176, we have considered the effect of such ownership upon recapture in the light of the Act of August 15, 1953 (16 U.S.C. § 828), which provides, in pertinent part,

"Section 14 of the Federal Power Act pertaining to the taking over by the United States of any project upon or after the expiration of a license . . . shall not be applicable to any project owned by a State or municipality, and such rights and requirements shall not exist under any license heretofore or hereafter granted to any State or municipality."

These seemingly unrelated inquiries have a common solution in the last proviso of Section 14(a),

"That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved."¹⁰⁵

The Federal Power Commission explained the purpose of the foregoing portion of the Act of August 15, 1953, as

¹⁰⁵While the Bands argue that they are "municipalities" within the meaning of certain other laws and that they should be accorded a preference as such under the Federal Power Act, we find that they do not come within the definition of "municipality" in Section 3(7). Accordingly, the Bands have no licensing preference as in the case of municipalities.

follows:

“The right of the United States to acquire or take over any project, regardless of the purpose served by the project, is conferred by the Constitution, and the acquisition must be in accord with the Constitutional authorization. Section 14 of the Federal Power Act does not confer upon Congress any right to acquire a licensed project but merely provides a formula under which the acquisition price can be determined in the event a licensed project is acquired by the United States at the end of the license period. Therefore, should [the bill] be enacted, the United States could still acquire or take over a project licensed to a State or a municipality by condemnation and upon payment of just compensation.”¹⁰⁶

In other words, neither Section 14(a) of the Federal Power Act nor the Act of August 15, 1953, changed the authority of Congress to take private property for public use in exercise of its various powers upon payment of “just compensation” as required by the Fifth Amendment to the Constitution.

The application of the concept of a project being a complete unit of improvement or development is sometimes arguable. Depending upon varying circumstances, Commission licenses are issued for multiple developments, single developments and portions of developments constituting projects. In view of the foregoing and the fact that the United

¹⁰⁶Senate Report No. 599 accompanying S. 2094, 83rd Congress, 1st Session, July 17, 1953. The hearings on S. 2094 and its counterpart, H.R. 6112, indicate that it was becoming increasingly difficult for States and municipalities to obtain financing beyond the term of a license in view of the fact that the licensed financed facilities were subject to recapture upon payment of their net investment in the facilities, plus severance damages. The hearings also indicate that such financing would be facilitated if the facilities were subject to condemnation under the Constitutional standard of just compensation.

States can take by condemnation part of a unit of improvement or development if it so chooses, it seems inappropriate that the question of whether the United States must pay the net investment plus severance damages under Section 14(a) or just compensation under the Fifth Amendment, should turn on fine points of the concept of what constitutes a project. For example, the Federal Power Commission treated Project No. 176 as a whole project in 1924, but today we treat it as only part of a larger unit of development including the Henshaw facilities and water rights. We therefore interpret Section 14(a) as permitting the United States to take over the entire Project No. 176 from the diversion dam to the Bear Valley tailrace upon payment of the net investment applicable to the entire project plus severance damages, and as permitting the United States to take over the portion of Project No. 176 from the diversion dam to the point of discharge into Lake Wohlford upon payment of the net investment applicable to that portion plus severance damages.

Although the Act of August 15, 1953, provides that Section 14 of the Federal Power Act shall not be applicable to any "project owned" by a State or municipality, we interpret it for the same reasons as applying to interests in projects which are so owned.¹⁰⁷ As a result, and in view of (1) our

¹⁰⁷Since the Commission licenses the construction, operation and maintenance of project works under the Federal Power Act, and since the Act of August 15, 1953, speaks of "project[s] owned" by States or municipalities, interpretative difficulties will arise when undivided interests in a project work are owned by a State or municipality, and by a non-State or non-municipality, or when one or more project works of a development are owned by a State or municipality, and one or more project works are owned by a non-State or non-municipality. Our interpretation that the Act of August 15, 1953, applies to interests in projects (developments) is consistent with the purpose of that Act in changing the payment formula to "just compensation" for licensed facilities which are owned by States and municipalities. Furthermore, States and municipalities may not have records which are adequate to determine their net investment in facilities since the Act of August 15, 1953, also exempts them from Sections 4(b), 301, and 302 pertaining to actual legitimate original costs and record and accounting procedures.

conclusion that under Section 8 Vista is subject to all of the provisions of the Federal Power Act to the same extent as though it were an original licensee, (2) the fact that Vista is a "municipality" and (3) the Act of August 15, 1953, Section 14 is not applicable to the interests in Project No. 176 which are owned by Vista, and Vista is entitled to just compensation for them.¹⁰⁸

Although we do not recommend that the United States take over Project No. 176 or any part of that project, we recommend in the event that Congress decides otherwise that the United States acquire Vista's Henshaw facilities and water rights by condemnation to provide a source of summer water. Our recommendation is based upon our finding that the Henshaw facilities are operated with the works of Project No. 176 as a single undertaking to supply water for domestic and irrigation consumption to the vicinities of Escondido and Vista, California. Furthermore, the Section 14 formula is not applicable in view of Vista's status as a "municipality" and the fact that the Henshaw facilities and water rights are not currently part of Project No. 176.

The staff takes exception to the presiding judge's failure to determine the amount of Mutual's net investment in Project No. 176, or at least the portion of that project proposed to be taken over by the United States, pointing out that Section 14(a) specifically requires the Commission to de-

¹⁰⁸Vista is entitled to just compensation for its undivided interest in the 48-inch pipeline which is jointly owned with Mutual, and Mutual is entitled to its net investment plus severance damages unless Congress chooses to pay just compensation. Vista is also entitled to just compensation for its penstock.

Since it appears possible to organize a "municipality" to take title to project works from a non-State or non-municipality to obtain just compensation instead of net investment plus severance damages, the Commission will consider such arrangements on a case-by-case basis. We are satisfied in this instance that Escondido's efforts to acquire Mutual or Mutual's assets for water supply purposes are bona fide.

termine both the net investment and the severance damages.

Neither the Federal Power Act nor the Commission's regulations thereunder specify *when* such a determination shall be made. Since the Commission is not either issuing a license to the Bands or joining Interior in recommending takeover, such a determination need not be made if Interior changes its position upon consideration of this Opinion and order and chooses not to move for a stay pursuant to 18 CFR § 6.10. We will, therefore, defer making such a determination until one is required.¹⁰⁹

LICENSING ISSUES

Sections 10(a) and 7(a)

Section 10 of the Federal Power Act prescribes in subsection (a) the Commission's fundamental mission in issuing both power and nonpower licenses and in considering development and takeover of power projects by the United States:

"All licenses issued under this Part shall be on the following conditions:

"(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other

¹⁰⁹It is assumed that Congress would want information pertaining to net investment and severance damages for its deliberations together with information pertaining to the fair value of property which may be condemned. On the other hand, 18 CFR § 16.11 specifies that "the licensee shall present to the Commission any claim for compensation consistent with the provisions of section 14 of the Federal Power Act and the regulations of the Commission" after Congress enacts takeover legislation, and it is assumed, further, that the amount of net investment and severance damages would be fixed as of the time of takeover.

beneficial public uses, including recreational purposes.

...¹¹⁰

Section 10(a) also grants the Commission's fundamental authority to carry out that mission:

"... and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."¹¹¹

The project adopted is essentially a product of the proposals in a licensing application, the contentions of interested parties and the expertise furnished by the Commission, its staff and others. The project which is best adapted to a comprehensive plan for beneficial public uses is neither fixed nor static and, as a result, the Commission's judgments with respect thereto can change over time and with conditions.

The project which is best adapted to a comprehensive plan for beneficial public uses in this instance involves the San Luis Rey River, which is a natural waterway, and the Escondido Canal, which is man-made. They have a common source of water, but since neither of them is navigable their possible use for the transportation of persons or property in interstate or foreign commerce is not a consideration. They have recreational values at Lakes Henshaw and Wohlford and at certain access points in the nine-mile reach of the

¹¹⁰The project which is so adopted in this Opinion and order is sometimes referred to herein as the "project which is best adapted to a comprehensive plan for beneficial public uses", the "comprehensive plan" or similar expressions extracted from Section 10(a).

¹¹¹This section focuses upon the Commission's exercise of its judgment in issuing a license to Mutual, Escondido and Vista, and rejecting the Bands' and Interior's proposals, and upon related legal issues. Factually related issues pertaining to the Commission's exercise of its modification authority are discussed *infra* under TERMS OF THE POWER LICENSE and TERMS OF THE TRANSMISSION LINE LICENSE.

San Luis Rey River between Vista's Henshaw Dam and Mutual's diversion dam, consisting principally of camping, boating and fishing.¹¹² There are also flood control values at Henshaw Dam and power values at the Rincon and Bear Valley powerhouses. But their most significant value, as all parties agree, comes from their ability to provide good quality and relatively inexpensive water for domestic and irrigation consumption in an essentially dry but fertile geographic area. Their water supply value, particularly as it relates to Henshaw-stored water for consumption during the dry summer period, dominates all other values in choosing among the competing proposals.

In issuing new licenses for previously licensed facilities the Commission is directed by Section 7(a) of the Federal Power Act to

"give preference to applications . . . by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans."

Having determined that the Bands are not "municipalities" (see Footnote 105), we do not reach or decide the question of whether municipalities have a preference under Section 7(a) over a prior non-municipality licensee, such as

¹¹²Swimming is not a recreational consideration because California law prohibits such use of municipal water supplies.

Mutual.¹¹³ Our decision is premised upon the superiority under Sections 10(a) and 7(a) of the joint Mutual/Escondido application. Assuming *arguendo* (contrary to our judgment) that the Bands' proposal is best adapted to develop, conserve, and utilize in the public interest the water resources of the region, our decision is also premised upon serious reservations as to the ability of the Bands to carry out their plans under a license or following takeover.

The presiding judge indicated that the Bands' irrigation program was not shown to be feasible because it requires rights to water together with Vista's cooperation in storing and delivering that water¹¹⁴ and, in addition, substantial amounts of capital for constructing irrigation facilities, preparing land, planting avocado and citrus trees and waiting for the first fruits. He said that the members of the Bands — about 600 on the reservations and an equal number elsewhere — could not be expected to raise the necessary capital through a stock offering or by mortgaging their government-restricted lands and, further, that Interior has not made any firm commitment to provide capital, even "to get things going." The Bands would raise capital, he indicated, by selling water which was not needed for irrigation during the early years of their program.¹¹⁵ And he concluded,

¹¹³Nor do we decide questions related to States or municipalities which are either applicants or joint licensees with non-States or non-municipalities.

¹¹⁴See THE BANDS' LICENSE APPLICATION IS DENIED — Water Rights, *supra*, and particularly the rejection therein of a possible Bands/Vista license. Cooperation between them appears to be unlikely for the additional reason that the Bands propose to sell some of the water to generate capital and to utilize some of their water-generated capital eventually to purchase Vista's Henshaw facilities and water rights.

¹¹⁵The Bands' and Interior's proposals thus appear to be supported financially by bootstraps. The Bands propose an irrigation program to obtain a license for Project No. 176, including the incident water rights, and they would then sell the water to generate capital and later utilize it for their program. Interior, on the other hand, proposes takeover by the United States so that Interior, acting for the United States, can provide the Bands with the water to generate capital and later utilize for the Bands' program.

“What is missing is any clear idea of the Bands’ substitute for the policy, fiscal, supervisory and management functions now performed jointly by the boards of directors of Mutual and of the Vista Irrigation District.”

We are in general agreement with the presiding judge’s foregoing assessment of the situation. The Bands and Interior contend in 263 pages of exceptions that their proposals are superior, and they conclude that it is time to change so that the purposes of the Bands’ reservations can be fulfilled. “The Indians deserve a chance.”

We agree fully that the Indians *deserve* a chance. But the Bands and the others tell us, in effect, that water is such a valuable commodity in Northern San Diego County that we, the Federal Energy Regulatory Commission, cannot *afford* to take that chance, or any chance, in selecting the licensees for Project No. 176. Mutual and Vista have been operating and maintaining the project and the Henshaw facilities for at least 50 years and have thus demonstrated their ability to continue doing so, even for the principal benefit of the Bands if the District Court should resolve the pending litigation in the Bands’ favor. But if the District Court were to resolve that litigation today in the Bands’ favor, and if a license were to be issued to the Bands and they fail to operate and maintain the project properly, then everyone — the Bands, as well as Mutual, Escondido and Vista — everyone would lose.¹¹⁶

¹¹⁶There appears to be some similarity among competing applications for licenses and corporate takeover and proxy contests. Since Section 7(a) requires that the Commission be satisfied as to the ability of competing applicants to carry out their plans, it would be helpful to the Commission for such applicants to refer to the corporate takeover and proxy contest rules of the Securities and Exchange Commission, particularly with respect to the type of personal and financial information which casts light upon their ability to do so.

The Bands and Interior assert on exception,

“Throughout the long trial in this case, one question stuck out, particularly during the California phases. Why are the Indians’ lands barren while adjoining lands of their white neighbors, which look the same, are intensively developed with citrus and avocado orchards? The answers are, we think, equally obvious. The primary reasons are interrelated: the lack of capital and the absence of a developed water supply other than the relatively meagre quantities that are now available to the Bands, primarily Pala and Rincon. The Bands’ and Interior’s proposal aims to correct both of these problems.”

We agree that the Bands’ reservations appear to be relatively impoverished compared to their neighboring lands¹¹⁷ because of a lack of capital and the absence of a *developed* water supply. But the Bands and Interior thereby imply that the Bands do not have water available to them, and we cannot agree with that implication. The water has been and still is available, although not in the quantities and not always at the times desired for the Bands’ ambitious irrigation program.

The development of a water supply requires, in addition to the water, adequate amounts of capital, initiative and everything else associated with the commencement and operation of a business enterprise. If the Bands had developed their available sources of water, that would have served as evidence that they have acquired the experience and skills which are essential to the successful operation of the larger program which they propose. But without that or some similar indication, we cannot afford to take any changes

¹¹⁷In addition to the relative barrenness of the reservations, the median resident family income is less than \$3,000 annually compared to \$9,300 for all families in Northern San Diego County.

with the San Luis Rey water supply by assuming that they have developed the necessary experience and skills.¹¹⁸

The Rincon, Pauma and Pala Indian Reservations overlie the Pauma and Pala Basins, which are underground storage reservoirs providing year-round sources of water. That underground basin water always has been and still is equally available to those Bands and to their neighboring landowners, and the latter have developed their citrus and avocado orchards notwithstanding the diversion of the San Luis Rey water for more than a half-century. The equal availability of the water and the fact that the particular Bands have not developed their reservations to the same extent as their non-Indian neighbors, indicate together that the Bands are not now prepared to carry out their ambitious agricultural program and take on the responsibilities of Project No. 176. While their reservations are barren, it is not because Project No. 176 has deprived them of water.¹¹⁹

¹¹⁸While the Bands obviously share a common interest in the San Luis Rey water as against Mutual, Escondido and Vista, which brings them together in this proceeding, we are unable to find a showing of a sufficient common interest among them, particularly of a commercial nature, which might serve as a nucleus for cooperative operation of Project No. 176 and an organized agricultural program. Indeed, the individual interests of particular Bands appear to conflict with the comprehensive plan which is adopted herein.

¹¹⁹The Bands and Interior fault the Initial Decision for not discussing Pauma and Pala Basin groundwater deterioration which, in their view, is "the most significant environmental aspect of this case."

A 1965 study of the California Department of Water Resources indicated that the groundwater within the Pauma Basin and the eastern half of the Pala Basin met the U.S. Public Health Service standards for drinking water and was excellent to good for irrigation, and that the groundwater within the western half of the Pala Basin was good to injurious for irrigation. However, the water from most wells on the Pala Indian Reservation met the drinking water standard and was excellent to good for irrigation. Groundwater downstream from the Monserate Narrows, in the Bonsall and Mission Basins, was poor to unusable.

Intensive agricultural development of the Pauma and Pala Basins began in the mid-1950's and was aggravated by the introduction in 1965 of low quality (high salinity) Colorado River supplemental irrigation water

Similarly, the La Jolla, Rincon and San Pasqual Indian Reservations are situated on the Escondido Canal and have water available to them under Article 14 of Mutual's 1924 license which provides,

which percolated into the two basins. The basins were, however, in hydrologic balance when they were studied in 1970.

A 1973 study of the Joint Administrative Committee of the Santa Margarita and San Luis Rey Watershed Planning Agencies projects a substantial increase in citrus and avocado acreage overlying the Pauma and Pala Basins. The study projects a corresponding sharp deterioration of those basins which, in turn, would result in a permanent increase of salinity and diminution of citrus and avocado yields. The projected increased acreage is roughly equivalent to the increased acreage under the Bands' proposed irrigation program and, as a result, the Bands and Interior take the position that additional releases of water into the basins are needed to counterbalance the increased withdrawals of water which the Bands contemplate.

Such releases would obviously benefit everyone who depends upon the Pauma and Pala Basins for domestic and irrigation water, including the Rincon, Pauma and Pala Bands and their non-Indian neighbors. But the Commission has no regulatory authority with respect to agricultural acreage. The Commission has no regulatory authority with respect to the number of wells which may be drilled into the basins, how deep they may be drilled and how much water may be withdrawn. And the Commission has no regulatory authority with respect to the construction of desalination facilities.

In 1974 Congress enacted the Safe Drinking Water Act, 42 U.S.C. § 300g *et seq.*, authorizing the Environmental Protection Agency to establish Federal standards for protection from all harmful contaminants, which standards are applicable to all public water systems, and establishing a joint Federal-State system for assuring compliance with these standards and for protecting underground sources of drinking water. U.S. Code Cong. and Adm. News, 93rd Cong., 2nd Sess., 1974, page 6454. The legislative history, and particularly the National Interim Primary Drinking Water Regulations Implementation at 40 CFR § 142, indicate clearly that the primary enforcement responsibility rests with the States.

Since Project No. 176 diverts water into the Escondido Canal which would otherwise percolate into the Pauma and Pala Basins, a permanent operating plan for that project as enlarged should attempt to recharge the groundwater within those basins to the maximum extent possible consistent with other beneficial public uses of the water. But in view of the limitations upon the Commission's authority in the light of the totality of the causes of the prospective groundwater degradation, and particularly in the light of the Safe Drinking Water Act, the primary control of the quality of the groundwater within the Pauma and Pala Basins rests with California and apparently its Department of Water Resources.

“The Licensee will interpose no objections to, and will in no way prevent, the use of water for domestic purposes by persons or corporations occupying lands of the United States under permit along or near any stream or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by this license.”¹²⁰

Additionally, the Rincon Band has water available under Article 24 which provides that the water rights incident to Project No. 176 are subject to the agreement of February 2, 1914. Admittedly, Article 14 water is not available when the Escondido Canal is closed for maintenance and repairs every fall, and Article 24 water is not available during periods of low natural flow. But Article 14 water is available in the canal during the dry summer months and, notwithstanding, the La Jolla, Rincon and San Pasqual Bands have made no organized effort to develop such supplies for domestic purposes.¹²¹

The San Luis Rey River, between Vista's Henshaw Dam and Mutual's diversion dam, contains some five to seven miles of the 22 miles of live stream in San Diego County,

¹²⁰ Although Article 14 speaks only of “domestic” consumption and of those occupying lands of the United States “under permit”, it is arguably construed to include agricultural consumption on homesites and to apply to the members of the La Jolla, Rincon and San Pasqual Bands. See TERMS OF THE POWER LICENSE — Licensees to Provide Water, *infra*.

¹²¹ It is understandable that the La Jolla Band individually has not attempted to develop a supply of San Luis Rey water because they never irrigated with such water and their reservation is largely mountainous. Similarly, the area comprising the San Pasqual Indian Reservation is partly outside the San Luis Rey watershed and is served in part by Valley Center water. The Rincon Band, on the other hand, could construct a dam across Paradise Creek and thereby develop the capacity to store water which is delivered to them through the Rincon penstock and powerhouse during the winter and spring months.

and is stocked annually with 25,000 trout. The releases of water from Lake Henshaw destined for Escondido and Vista produce a fairly constant flow in that reach of the river which, in turn, incidentally benefits the La Jolla fishery. But the water release regime, and particularly low flows during the months of September, October and November, limit the utilization and expansion of the La Jolla fishery. The Bands, under their proposal, would seek to schedule releases to maximize fishery benefits and recharge the Pauma and Pala Basins; but Vista has refused to alter the operating regime.

The matter should be explored in conjunction with the development of a permanent operating plan for Project No. 176, which plan should attempt to maximize the fishery benefits at the La Jolla Indian Reservation consistent with other beneficial public uses of the water.

Lake Wohlford is operated primarily for the storage of water and secondarily for recreation and, as a result, its level fluctuates an average of 15 to 16 feet each year, adversely affecting aesthetic and fishery values. Under the Bands' proposal Lake Wohlford would be operated primarily for recreational purposes and would be maintained at a more stable and higher level. On the other hand, less water would reach Lake Wohlford and it would gradually deteriorate. The Bands and Interior concede that appropriate license conditions would be required under the Bands' proposal to preserve the quality of Lake Wohlford.

Mutual and Escondido obtain approximately 35% of their water requirements through Project No. 176, and Vista obtains about 54%; and they obtain the remaining 65% and 46%, respectively, through MWD from the San Diego Aqueducts. Their San Luis Rey water is considerably better in quality, averaging 300 to 400 parts per million of dissolved solids, than the Colorado River water which they received

in recent years through the San Diego Aqueducts and which averaged 800 parts per million. However, they are now receiving or will soon receive through the Second San Diego Aqueduct a blend of Northern California and Colorado River water which should not be materially different in quality from their San Luis Rey water.

The matter of comparative costs is more complicated. All of the parties agree that San Diego Aqueduct water would cost more than San Luis Rey water,¹²² but they disagree as to how much and what should be included. According to Mutual, it would cost them \$915,646 more annually to purchase additional San Diego Aqueduct water; construct, operate and maintain a water storage facility on Escondido Creek; and purchase Vista's capacity in a joint filtration plant. According to Vista, it would cost them \$681,895 more annually to purchase additional water and construct, operate and maintain additional facilities. But the Bands contend that some of those facilities are not needed and others represent improvements rather than replacements, and that the total additional cost to both Mutual and Vista would be only \$400,000. In view of the nature of this proceeding it is not necessary to resolve the issues thus raised; it is sufficient to note the additional costs and their probable range.¹²³

¹²²The Bands and Interior assert, in this connection, that 70% of Escondido's water supply is consumed domestically, that 60% of Vista's water is so consumed, that those percentages are growing, that domestic water supplies customarily command higher rates than agricultural water supplies, at least in Southern California, and, as a result, that Escondido's and Vista's customers are better able to afford the higher water costs.

¹²³The Bands and Interior insist throughout their brief that the issuance of a license which includes Mutual as a licensee will result in a \$2,500,000 windfall to Mutual's shareholders, representing the portion of the acquisition price of Mutual's stock which they attribute to Project No. 176 and which will be repaid to Escondido over time by its water users. They contend that the \$2,500,000 is a windfall because the Project No.

The Banks and Interior contend on exception that under the Mutual and Escondido proposal no new lands will be brought under cultivation, no new economies will be developed, no groundwater basins will be recharged or preserved qualitywise, and no underutilized human resources will be made productive.¹²⁴ While they thereby infer that such benefits will accrue under their proposals, they concede that such benefits are possible only because Escondido and Vista have an alternative source of water.

Mutual, Escondido and Vista contend, on the other hand, that they will continue to generate clean non-polluting water power at the Rincon and Bear Valley power plants, provide free water and low cost power to the Rincon Band, provide quality recreational opportunities at Lake Wohlford, maintain roads within the Bands' reservations, utilize Henshaw Dam for flood control, and release water at Henshaw Dam

176 facilities, as such, were worth nothing upon the expiration of Mutual's 1924 license; because their value arises through the utilization of the La Jolla, Rincon and San Pasqual Indian Reservations under a new license; and because the Commission does not have authority to grant that permission. We do not agree that we do ~~not~~ have such authority since one of the purposes of the Federal Water Power Act of 1920 was to centralize in the Federal Power Commission authority to grant permission to utilize government lands, including lands reserved for Indians, for power purposes. In any event, we do not see the relevancy of the \$2,500,000 distribution to the selection of the comprehensive plan because the Bands and Interior contend that a license for the Bands or takeover would best serve the public interest and a license which includes Mutual would serve primarily private interests, and Mutual, Escondido and Vista say that a new license would best serve the public and a license for the Bands or takeover would serve the private interests of the Bands. In truth, all of the interests asserted in this proceeding partake of a mixed private and public character and, as a result, the labels applied by particular parties are not helpful in selecting the project which is best adapted to a comprehensive plan for beneficial public uses.

¹²⁴They also contend that no national policies will be implemented and no improvements will be made. But it has been shown that national energy policies will be implemented and a portion of the Escondido Canal on the San Pasqual Indian Reservation will be removed.

to make possible the recreational developments on the La Jolla Indian Reservation and upstream at the Forest Service campground.

The Escondido Canal has been conveying water from the San Luis Rey watershed to the Escondido area for more than 80 years and to the Vista area for more than 50 years. It was the first significant man-made water conduit in Northern San Diego County. Water and irrigation districts were formed, facilities were constructed, service areas were defined and patterns of water supply and distribution were developed as they are today in reliance upon the historic appropriations of the San Luis Rey River in the 1890's and the 1910's. We believe that the existing patterns should be disturbed as little as practicable consistent with the beneficial public uses of the water.

The economies of Escondido and Vista outgrew their San Luis Rey water supply and the two service areas were forced to obtain additional supplies through MWD from the San Diego Aqueducts. Their service area populations are continuing to grow and reached an estimated 64,000 persons in 1977 in the case of Escondido and 46,500 persons in the case of Vista.¹²⁵ Their consumption patterns are moving from agricultural to domestic, and are decidedly domestic. And Congress in 1974 enacted legislation to assure the safety of drinking water, thereby suggesting that the utilization of water for drinking and other domestic purposes should carry the highest priority.¹²⁶

¹²⁵Official notice is taken of the latest population estimates contained in Vista's Draft Environmental Impact Report of the Modification of Henshaw Dam and Warner Ranch Ground Water Program. They are consistent with earlier figures in the record.

¹²⁶See the Safe Drinking Water Act, House Report No. 93-1185, U.S. Code Cong. and Adm. News, 93rd Cong., 2nd Sess., 1974, at page 6457, wherein "safe water to drink" and "safe air to breathe" are called "the fundamental elements of life".

The Bands, on the other hand, want 32,000 acre-feet of water, which is more than the San Luis Rey River apparently can supply, to irrigate 10,500 acres of their reservations. Even though they have no actual need within the foreseeable future for all of the water which is conveyed through the Escondido Canal to the Escondido and Vista areas, the Bands would appropriate all of that water in apparent violation of the policy of the California State Water Resources Board.¹²⁷ And even though they have no actual need within the foreseeable future for all of that water, the Bands would reserve all of that water under the implied-reservation-of-water doctrine to enable them to raise capital by selling the amounts not needed for off-reservation utilization, in apparent violation of the implied-reservation-of-water doctrine as most recently addressed by the Supreme Court in *United States v. New Mexico*, *supra*.¹²⁸

On balance, we find that the joint Mutual/Escondido proposal to continue operating Project No. 176 in a manner

¹²⁷See *California v. United States*, *supra*, Slip Opinion at pages 6 and 7, wherein the Supreme Court quoted a condition imposed by the State Water Resources Control Board to the effect that the limited unappropriated water resources of California should not be committed to an applicant in the absence of a showing of the applicant's actual need for the water within reasonable time in the future. In our opinion, the Bands' showing of need lacks specificity, including their overall ability to carry out their irrigation program.

¹²⁸After finding in *United States v. New Mexico*, *supra*, that national forests are reserved for the purposes of conserving water flows and furnishing continuous supplies of timber, the Supreme Court held that the implied-reservation-of-water doctrine applies to water which is utilized for those purposes only and, conversely, that it does not apply to water which is utilized for secondary purposes of national forests, such as aesthetic, recreational, wildlife-preservation and stockwatering purposes. It would appear under the rationale of that decision that water is impliedly reserved for Indian reservations for domestic, agricultural and stockwatering *on-reservation* consumption and, conversely, that water is not reserved for the secondary purpose of improving Indians socio-economic status by its sale for *off-reservation* utilization. See Footnote 194.

similar to that which has been followed in the past, is superior to the Bands' and Interior's proposals for a license or takeover, and that it is particularly well suited to modification to accommodate the water needs of the La Jolla, Rincon and San Pasqual Bands, and to disturb the existing patterns of water supply and distribution only minimally and gradually. Although the joint proposal as modified will do less for the Pala and Pauma Bands than the Bands' and Interior's proposals, it should result in more recharging of the Pala and Pauma Basins than at present if the La Jolla fishery can reasonably be extended to year-round operation and/or if the agricultural utilization and irrigation of the Rincon Indian Reservation can be intensified. Article 34, in particular, requires the maintenance of a minimum pumped flow at the eastern boundary of the Pala Indian Reservation. But, for the reasons discussed in Footnote 119, the primary control of the groundwater within those basins rests with the State of California.

Accordingly, we find that the issuance of a license to Mutual, Escondido and Vista, subject to the terms and conditions specified therein, will be best adapted to a comprehensive plan for improving or developing the San Luis Rey and Escondido Canal waterways for beneficial public uses. We find, additionally, that the plan of Mutual and Escondido as conditioned in the license, including the plans of Vista, are best adapted to develop, conserve and utilize in the public interest the water resources of the region; and we are satisfied as to their ability to carry out such plans as conditioned.

Socio-Economic Issue

The Bands and Interior contend that a license should be issued to the Bands in furtherance of the national policies promulgated by Congress in various Indian-oriented legis-

lation, particularly the recent Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 *et seq.*,¹²⁹ and the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.* They state that the first of the two statutes is a major reason for Interior's support of the Bands' application for a license over its own takeover proposal.

We do not quarrel with the policies of those statutes or doubt their wisdom. They are, however, administered by Interior rather than by the Commission. The Federal Power Act in Section 4(e) prohibits the Commission from issuing licenses which interfere or are inconsistent with the purposes for which particular reservations are created or acquired. That Act in Sections 10(e) and (i) directs the Commission to fix reasonable annual charges for the use of lands within Indian reservations. But there is nothing in the legislative history of the Federal Power Act which indicates that the purposes for which it was enacted include the development and utilization of Indian human and physical resources. *National Association for the Advancement of Colored People v. Federal Power Commission*, 425 U.S. 662 (1976). There is nothing in the legislative history to indicate that the Commission should give special consideration to Indian resources.

We agree with Mutual, Escondido and Vista that the Commission does not have broad authority to issue licenses

¹²⁹Congress declared its commitment at 25 U.S.C. § 450a(b) to "the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people to the planning, conduct, and administration of those programs and services." And at 25 U.S.C. § 450a(c):

"The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being."

to promote the welfare of the particular Bands. The Commission is required to choose among competing relicensing and takeover proposals in accordance with the directives of Sections 10(a) and 7(a) pertaining to beneficial public uses, water resources of the affected region and abilities to carry out the proposals, and socio-economic considerations are subsumed within those directives.

That is not to say that the Commission cannot condition licenses pursuant to its authority in Sections 10(a) and 10(g) to minimize adverse socio-economic consequences of a project.¹³⁰ Indeed, the Commission is directed by Section 102(1) of the National Environmental Policy Act of 1969 to administer the Federal Power Act in accordance with the policies set forth in Section 101(b), including in subsection (5) the policy of achieving "a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities". The Commission therefore has authority to condition a license for Project No. 176 to assure that the members of the Bands, to the extent practicable and as members of the public, will share the expected water benefits of the project.

The principal function of the Escondido Canal is to convey water from the San Luis Rey River, through a relatively low socio-economic environment, to sustain a relatively high quality of life in the Escondido and Vista areas. Although those whose lands are utilized to convey that water are entitled to reasonable rentals or annual charges, cash

¹³⁰In the Initial Decision issued September 20, 1976, in *Virginia Electric and Power Company*, Project No. 2716, the licensee was required to give financial assistance to a rural community to mitigate the impact from an influx of construction workers upon the community's expenditures for education, law enforcement, solid waste disposal, general government costs and welfare and other social services. Affirmed with minor modifications, Opinion No. 785, issued January 10, 1977.

payments alone are not sufficient compensation in that water-deficient environment. We find that it is appropriate and in the public interest that the La Jolla, Rincon and San Pasqual Bands be accorded an opportunity to utilize some of that water to achieve socio-economic equality with those whose environment is sustained by it. And we are conditioning the license issued herein pursuant to the authority of Section 10(a) to achieve that beneficial public use of the water, among others.

Applicability of Sections 4(e) and 15(a)

Section 4 of the Federal Power Act provides, in pertinent part,

“The Commission is hereby authorized and empowered—

* * *

“(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining . . . project works necessary or convenient . . . for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction . . . or upon any part of the public lands and reservations of the United States . . . or for the purpose of utilizing the surplus water or water power from any Government dam. . . .”

Section 15(a) provides, in pertinent part, that if the United States does not exercise its right to take over a project,

“[T]he Commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under

said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license. . . .”

The Commission staff, Mutual, Escondido and Vista contend that initial licenses for proposed or existing facilities are issued pursuant to Section 4(e) exclusively, and that new licenses for previously licensed facilities are issued pursuant to Section 15(a) exclusively. As a result, they contend that in issuing new licenses for previously licensed facilities the Commission does not have to make the finding and impose the conditions specified by the first proviso of Section 4(e), as follows,

“That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.”

The Bands and Interior contend, on the other hand, that new licenses for previously licensed facilities are issued pursuant to Sections 4(e) and 15(a) together. They claim that the Commission must make the finding required by the first proviso of Section 4(e), that it cannot do so and, as a result, that the Commission cannot issue a new license to Mutual. Furthermore, Interior has propounded twelve conditions to be included in a new license to Mutual, and they claim that the Commission must include them as propounded.

There is authority to support both positions. Among other provisions, Section 7(a) prescribes the Commission's mandate in “issuing licenses under section 15”, and Section 14(b) speaks of relicensing “pursuant to the provisions of

section 15'', in both cases, without also mentioning Section 4(e). Furthermore, the Federal Power Commission on December 19, 1974, acting under Section 15(a) exclusively, issued a new license to PGandE for its Project No. 619 (52 FPC 1898). The Secretary of Agriculture, who had submitted certain recommendations but was not a party to the proceeding, sought reconsideration of the Commission's failure to include the recommended measures in the new license, claiming that Section 4(e) required the Commission to do so. The Commission considered those recommendations again and, by order issued February 19, 1975, 53 FPC 523, rejected them again, stating at page 526,

"Initially we note that under the Act new licenses are issued under Section 15 rather than under Section 4(e). But even assuming that Section 4(e) were applicable in this proceeding the new license would not interfere or be inconsistent with the purpose for which such reservation was created or acquired. The authority to make such a finding is that of the Commission alone. Such a finding must be made, of course, in the light of and in accordance with the information of record in the proceeding. Thus, while the Commission gives great weight to the judgment and recommendations of the Department concerned, the Commission nevertheless must act on the basis of the record as a whole and must exercise its judgment to insure that the project, if licensed, meets the requirements of Section 10(a) of the Act." (Footnotes omitted.)

Section 15(a), on the other hand, authorizes the Commission to issue new licenses "upon such terms and conditions as may be authorized or required under the then existing laws and regulations", which would seem to include Section 4(e). Together, Sections 7(c) and 15(a) direct the Commission not to issue licenses and to issue licenses under specified circumstances, and in that context Section

15(a) provides independent authority to issue new licenses for previously licensed facilities. But Section 15(a) does not specify *to whom* such licenses may be issued¹³¹, *for what purposes* they may be issued¹³², or *on what jurisdictional bases* they may be issued¹³³, all of which are supplied by Section 4(e). Furthermore, a month after the Commission denied the Secretary of Agriculture's application for reconsideration pertaining to PGandE's Project No. 619, *supra*, the United States Court of Appeals for the District of Columbia Circuit held¹³⁴ that the Commission could issue annual licenses pursuant to Section 15(a) over the objections of the affected Indians, stating, 510 F.2d, at page 212,

"The issuance to Northern States [Power Company] of interim annual licenses is affirmed, and the question of whether the Section 4(e) determination can be made despite the Band's failure to assent to any further long-term licenses covering its tribal lands is left to the Commission for further consideration in the pending recapture-relicensing proceedings."¹³⁵

We find that Section 4(e) is applicable to the issuance herein of a power license to Mutual, Escondido and Vista because such action is partly an initial licensing of the Henshaw facilities and partly a relicensing of the presently licensed Project No. 176 facilities, and all of those facilities

¹³¹To citizens of the United States, associations of such citizens, certain corporations, States and municipalities.

¹³²For constructing, operating and maintaining project works, or utilizing surplus water or water power.

¹³³Bodies of water over which Congress has jurisdiction, public lands and reservations of the United States, and Government dams.

¹³⁴*Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Federal Power Commission*, 510 F.2d 198 (CA DC 1975).

¹³⁵There are several indications in the opinion that Section 4(e) is applicable to relicensing. Furthermore, the recapture-relicensing proceeding involved in that opinion is pending before the Commission on exceptions to an Initial Decision.

are operated as a single undertaking.¹³⁶ The Project No. 176 which is being relicensed is so materially different from the Project No. 176 which was initially licensed in 1924 that little more than the project number remains the same and, as a result, it is appropriate that the issues raised by the first proviso of Section 4(e) be considered and addressed.¹³⁷ For that reason, and for the additional reason that our rationale in this initial contested recapture-relicensing decision is best understood by addressing those issues, it is inappropriate to invoke Section 10(i) to waive Section 4(e).

First Proviso of Section 4(e)

— Interference with Reservations

The Bands and Interior assert on exception,

“There is no conceivable way that the Commission can grant a new license to Mutual . . . and still make a finding that the license will not interfere or be inconsistent with the purpose for which the La Jolla, Rincon, San Pasqual, Pauma, Yuima and Pala Res-

¹³⁶Accordingly, we do not reach and will not decide the question of whether presently licensed facilities are relicensed pursuant to Sections 4(e) and 15(a) together or pursuant to Section 15(a) exclusively.

¹³⁷Mutual represented in the 1924 refile of its application for a license that the project did not involve the construction of any dams and that the San Luis Rey River was the source of its water. As a result, Project No. 176 was licensed as a run-of-the-river project, i.e., without licensing provisions for the operation of the Henshaw impoundment, even though it appears that the Federal Power Commission knew that the Escondido Canal was to be enlarged and would be used to convey water of San Diego County Water Company. Subsequent to the issuance of the license the diversion flows through the Escondido Canal were increased from an average of 4,344 acre-feet annually to an average of 14,600 acre-feet annually; the small diversion tunnel was replaced by a 16-foot high, 112-foot long concrete diversion dam and appurtenant works; and the project was operated as a single undertaking with the unlicensed Henshaw facilities, including the pumping facilities which were placed into service in the 1950's. Today, as discussed under JURISDICTION — The Henshaw Facilities and Water Rights, Project No. 176 is being licensed as including upstream storage.

ervations were established, as is required by Section 4(e).”

The Commission is not required to make such a finding with respect to all of those reservations. As indicated, the first proviso of Section 4(e) states, in pertinent part,

“That licenses shall be issued *within any reservation* only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which *such* reservation was created or acquired. . . .” (Emphasis added.)

Those words clearly mean that the interference/inconsistency finding is applicable only to those reservations which are to be occupied by project works. The Commission is therefore required to make such a finding only with respect to the La Jolla, Rincon and San Pasqual Indian Reservations if a license is to be issued to Mutual, Escondido and Vista. Furthermore, the finding is for the *Commission* to make, not the Bands or Interior, and the issue is whether the *license as conditioned* will interfere or be inconsistent with the purpose of those reservations.

The Bands and Interior do not focus their interference/inconsistency claim upon the physical occupation of large or strategic parts of the respective reservations because (a) some physical occupancy of a reservation is unavoidable in the issuance of a license within that reservation, (b) the physical intrusions in question are minor¹³⁶ and (c) the Bands

¹³⁶The diversion dam, caretaker's house, Escondido Canal and appurtenant works occupy approximately 3/10 of 1% of the La Jolla Indian Reservation consisting of mountainous terrain with little or no suitability for other uses. The Escondido Canal, Rincon powerhouse and appurtenant works similarly occupy about 7/10 of 1% of the Rincon Indian Reservation also consisting of mountainous terrain, except for the small amount of land occupied by the power facilities. And the Escondido Canal occupies 2.6% of the San Pasqual Indian Reservation consisting mainly of relatively low land which is suitable for other uses. As proposed by Mutual and Escondido, all but about 825 linear feet of open

would not remove those intrusions (except eventually the Rincon powerhouse) under their licensing proposal or Interior's takeover proposal. They contend, instead, (1) that "Any water that Mutual is licensed to take through Indian lands that could otherwise be utilized by the Bands necessarily interferes with the utilization of the reservation by the Indians" and (2) that the physical occupation of any reservation lands by non-Indians upon the Commission's authorization and without the respective Bands' consents necessarily interferes with their sovereignty over their reservations and their right of self-government.

Insofar as the Bands' and Interior's exception is bottomed on the deprivation of water to the La Jolla, Rincon and San Pasqual Indian Reservations, it is premised upon an assumption that Mutual and Vista would be permitted under a new license to continue to operate Project No. 176 as in the past and currently. Under such operation, an annual average of 14,600 acre-feet of San Luis Rey water is diverted into the Escondido Canal for conveyance to and consumption in the Escondido and Vista areas, except for a vague six cfs of natural flow (or three cfs during certain months of extremely dry years) to which the Rincon Indian Reservation is entitled. In considering a plan which will be

canal and 1,598 feet of pipeline conduit on the San Pasqual Indian Reservation will be replaced, and the remaining 825 feet of open canal running from higher to lower elevations will be fenced for safety.

The Bands and Interior correctly point out that the Federal Power Commission found in its order of February 4, 1977, pertaining to Southern California Edison Company's Project No. 120, that the occupation by transmission and telephone line rights-of-way of 9.6% of a relatively small (105 acre) Indian reservation, most of which was unsuitable for residential development, was inconsistent with the purpose of the reservation to provide an autonomous home for the Indians. The physical intrusions herein are materially smaller, not strategic to the purposes of the reservations, and involve a gravity water conduit which presumably would be much more difficult to relocate around the reservations than transmission and telephone lines.

best adapted to develop, conserve and utilize in the public interest the water resources of the region, as well as to a comprehensive plan for beneficial public uses, we have determined that Mutual, Escondido and Vista should be required to treat portions of the three reservations as a joint service area of Escondido and Vista, and to supply water from the Escondido Canal to that service area in such quantities as can be and are in fact utilized therein.

Specifically, Article 29 of the power license issued herein requires Mutual, Escondido and Vista to supply water to an Indian Service Area consisting of the portions of the La Jolla and Rincon Indian Reservations lying west (or downstream) from the contour passing through the crest of the spillway of the diversion dam and portions of the San Pasqual Indian Reservation through which the Escondido Canal passes. While this service requirement is discussed in greater detail under TERMS OF THE POWER LICENSE — Licensees to Provide Water, *infra*, it should be noted at present that unlike the Winters doctrine under which the three Bands or some of them may be found to be entitled to reserved natural flows, Article 29 will provide them with sufficient water for domestic, agricultural and stockwatering utilization throughout the greater part of the year¹³⁹ and particularly during the critical dry summer months.

¹³⁹When the Escondido Canal is closed for maintainance and repairs Escondido and Vista can provide water to their respective existing service areas from Lake Wohlford and/or the San Diego Aqueducts. However, such service to the Indian Service Area is precluded by geographic factors and, as a result, the three Bands will be required to continue to obtain their water from other sources when that conduit is closed. To the extent not currently practiced, consideration should be given to the performance of maintainance services upon the upper portion of the Escondido Canal (to the Rincon diversion facility) prior to the lower portion, with a view toward reopening the upper portion at the earliest practicable date and while maintenance services are still being performed upon the lower portion.

The Bands and Interior contend that the La Jolla, Rincon and San Pasqual Indian Reservations were created or acquired for the purpose of providing permanent homes for the members of the respective Bands where they can be economically self-sufficient. Their claim is not disputed and is supported by the record. Insofar as the fulfillment of that purpose requires the availability of water, we find that a license which is conditioned to provide sufficient water for domestic consumption, and to to irrigate crops and water livestock, and to carry on small businesses, will not interfere or be inconsistent with the purpose of providing permanent homes where the members of the respective Bands can become self-sufficient. Article 29 of the license was designed, among other purposes, to preclude such interference or inconsistency; and we find that the license as conditioned will provide sufficient water to fulfill the foregoing purpose of providing permanent homes, rather than to interfere or be inconsistent with it.

Insofar as the Bands' and Interior's exception is bottomed on the Bands' sovereignty over their reservations and their right of self-government,

"Perhaps the most basic principle of all Indian law . . . is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*" (Felix S. Cohen's Handbook Of Federal Indian Law, page 122; emphasis in original.)

Since the limited sovereignty of the La Jolla, Rincon and San Pasqual Bands is of inherent origin, it is obvious that their respective reservations were not created or acquired for the purpose of granting sovereignty and the correlative

right of self-government to them.¹⁴⁰ Accordingly, the Commission is not required to find that the license issued to Mutual, Escondido and Vista will not interfere or be inconsistent with their sovereignty over their reservations and their right of self government.¹⁴¹

¹⁴⁰ Assuming *arguendo* that the respective reservations were created or acquired for the purpose of providing places for the three Bands to exercise their sovereignty and their correlative rights of self-government: The Bands and Interior rely on the words in Section 3 of the Mission Indian Relief Act (and in similar language in the patents implementing the La Jolla, Rincon and San Pasqual Indian Reservations) that the United States will hold the patented land "for the sole use and benefit of the band or village to which it is issued". Those words are similar to the conveyancing words which are generally used in legal documents, as is evidenced by Section 5 of that Act pertaining to allotments to individuals, that the United States

"will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in the case of his decease, of his heirs according to the laws of the State of California, and that at the expiration of such period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

The Bands and Interior contend, "Under Mutual's proposal, the Indian lands would not be used solely to benefit the Indian owners." In effect, such a position precludes the Commission from granting a license to non-Indians without the Bands' and Interior's consent because, as indicated, some physical occupancy of a reservation is unavoidable in the issuance of a license within that reservation. Accordingly, such a position places the Mission Indian Relief Act in direct conflict with the first proviso of Section 4(e) which authorizes the Commission to issue licenses within reservations and directs the Commission, rather than the Bands and/or Interior, to make the interference/inconsistency finding. And, as a result, the Mission Indian Relief Act would be deemed repealed to the extent of such inconsistency, by Section 29 of the Federal Power Act which provides, "That all Acts or parts of Acts inconsistent with this Act are hereby repealed. . . ."

¹⁴¹ "Indian self-government . . . includes the power of an Indian tribe to adopt and operate under a form of government of the Indians choosing, to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice." (Felix S. Cohen's Handbook Of Federal Indian Law, page 122.)

Indian self-government therefore pertains to internal matters, as distinguished from external matters which are governed by the Constitution and laws of the United States. In this connection, Congress has given the Commission authority to issue licenses for water power projects which interfere to a limited extent with the *exclusiveness* of the use and

—(*Interior's Conditions*)

The Bands and Interior contend on exception that the Commission is required by the first proviso of Section 4(e) to include the twelve conditions propounded by Interior in any new license issued to Mutual, Escondido and Vista:

"That licenses . . . issued within any reservation . . . shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation."
(Emphasis added.)

They assert that the conditions must be reasonable and supported by substantial evidence, and that the test of reasonableness is the statutory standard of whether they are "necessary for the adequate protection and utilization of" the affected reservations. And they add, "If the conditions are reasonable when judged by that standard, they are valid and if the conditions preclude the necessary § 10(a) finding, there will not be a project or the project will be modified."

While the first proviso of Section 4(e) purports on its face to require the inclusion of Interior's proposed conditions in a license issued to Mutual, Escondido and Vista, we believe that the Commission's mandate under Section 10(a) to condition all licenses in such manner "as in the judgment of the Commission will be best adapted to a comprehensive plan" for beneficial public uses, requires the Commission to exercise its judgment in determining the extent to which it will include a Secretary's proposed conditions in a license.

Water power projects commonly necessitate the utilization of national forests, which are forest reservations under the supervision of the Secretary of Agriculture, and/or Indian and other reservations under the supervision of the Secretary of the Interior. Since 1920 those two Secretaries

have been subject to the mandate of the first proviso of Section 4(d) of the Federal Water Power Act (which remains unchanged as the first proviso of Section 4(e) of the Federal Power Act) to propose for inclusion in licenses such conditions as the particular Secretary deems necessary for the adequate protection and utilization of any reservations under that Secretary's supervision which would be utilized by a particular water power project.¹⁴² Also since 1920, the Federal Power Commission (and since 1977 the Federal Energy Regulatory Commission as its successor) has been subject to the mandate of Section 10(a) that the project adopted shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for beneficial public uses.¹⁴³

From 1920 to 1930 the Federal Power Commission consisted of the two Secretaries and the Secretary of War and, as a result, any conflict between the two mandates could be resolved internally within the particular Secretary's office. So long as the two Secretaries were also Federal Power Commissioners they could balance their judgments as Secretaries as to what conditions should be included in particular licenses for the adequate protection and utilization of reservations under their supervision, against their judgments

¹⁴²We agree, in this connection, with the Bands' and Interior's position with respect to the nature of Interior's mandate under the first proviso of Section 4(e). But it is emphasized that the term "deem necessary" therein involves as much an exercise of judgment (although in a particular direction) as the term "judgment" in Section 10(a).

¹⁴³Section 10(a) of the Federal Water Power Act provided, in pertinent part,

"That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the commission will be best adapted to comprehensive scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial public uses. . . ."

The differences between it and the current Section 10(a) are not material to the issue under consideration.

as Commissioners with respect to the best comprehensive scheme of beneficial public uses. And they could refrain from proposing conditions as Secretaries which they could not accept in their judgments as Commissioners.

In 1930 the Federal Power Commission was reorganized as an independent agency. The first proviso was not changed and, as result, it is inevitable that from time to time the Commission's judgment under Section 10(a) will come into conflict with a Secretary's judgment under the first proviso of Section 4(e). When that occurs, as it does in this proceeding, the Federal Power Act should be construed to accomplish rather than defeat its purpose. As indicated under JURISDICTION — The Present Project No. 176, the principal purpose of the Federal Water Power Act of 1920 was to establish a national policy to promote the comprehensive development of water power, and to administer that policy by abolishing the piecemeal authorities of the Secretaries of the Interior, Agriculture and War over the nation's hydroelectric resources and centralizing them in the Federal Power Commission. To give precedence to a Secretary's judgment over the Commission's judgment would, in our opinion, defeat rather than accomplish that purpose. "It is the *Commission's* judgment on which Congress has placed its reliance for control of licenses." *Federal Power Commission v. Idaho Power Company*, 344 U.S. 17, 20 (1952) (Emphasis added).

In summary, from 1920 to 1930 the decisions of Secretary-Commissioners to condition water power licenses to protect and promote the utilization of reservations were judgmental in their character. But in 1930 the decisions of the Secretaries to so condition water power licenses were cast into an arena of potential conflict with the decisions of independent Federal Power Commissioners to choose the best comprehensive scheme of beneficial public uses. The

legislative history of the 1930 amendment cited by the staff indicates that the potential conflict was understood by the then Secretaries of Agriculture and of the Interior, and that they acknowledged that the independent Commission could not be effective unless it controlled all licensed power sites. We therefore construe that the word "shall" as requiring the Commission to give great weight to the judgments and proposals of the Secretaries of the Interior and Agriculture with respect to conditions to be included in water power licenses, but preserving the Commission's authority to exercise its judgment under Section 10(a) upon the entire record with respect to the extent to which such conditions will in fact be included in particular licenses. 53 FPC 523, 526.

Furthermore, there are reasons for rejecting conditions propounded by the Secretaries other than conflicts between the protection and utilization of reservations, and best adapted comprehensive plans for beneficial public uses. For example, we agree with the sense of Condition 3¹⁴⁴ that Vista should be subject to the Commission's jurisdiction and to the terms and conditions of the license issued herein. But we reject the condition that Vista *agree* thereto since we have found under JURISDICTION — Vista Irrigation District, that Vista is in law subject to the Commission's jurisdiction, and the license is being issued to Vista as a joint licensee.

Interior's proposal is not responsive to the first proviso of Section 4(e) in that Interior states that its proposed conditions are "deemed necessary for the adequate protection and utilization of the La Joila, Rincon, San Pasqual, Pauma, Yuima and Pala Indian Reservations." But consistent with the discussion under First Proviso of Section 4(e) — Inter-

¹⁴⁴"That the Vista Irrigation District agrees to be subject to the terms and conditions of the license and to the jurisdiction and control of the Federal Power Commission."

ference with Reservations, Interior's proposed conditions should be those deemed necessary for the adequate protection and utilization of the La Jolla, Rincon and San Pasqual Indian Reservations only.

Perhaps the most significant reason for rejecting most of the conditions propounded by Interior is the position that they must be included in a license exactly as propounded. If the Commission were required to include those conditions in the license issued herein, it would be unable to exercise its judgment and authority under Section 10(a) to reshape Mutual's and Escondido's joint licensing proposal into the project which is best adapted to a comprehensive plan for beneficial public uses.

Condition 2¹⁴⁵ is rejected in its entirety. The utilization of Vista's lands above Henshaw Dam will be subject to the provisions of the Federal Power Act and the Commission's Rules and Regulations thereunder, as well as the terms of the power license issued herein, to the extent such lands are brought within the ambit of the license. Furthermore, the condition is vague in several particulars (e.g., who is to determine downstream adverse effects, and how consents are to be obtained) and unreasonable in others (e.g., the storage of water above Henshaw Dam adversely affects downstream quantity in view of the evaporation factor and apparently would have to be stopped). And finally, the

¹⁴⁵ "That the Vista Irrigation District will not utilize its lands above Henshaw Dam in any manner that will adversely affect downstream water quality or quantity. Before the Vista Irrigation District initiates any uses of its land above Henshaw Dam that may adversely affect downstream water quality or quantity, it must obtain the written consent and approval of the Federal Power Commission, the Commissioner of the Bureau of Indian Affairs, and the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians. This condition shall not apply to the use of the lands above Henshaw Dam for grazing purposes or to the current recreation lease."

utilization of Vista's lands above Henshaw Dam will not be subject to the Commission's jurisdiction to the extent such lands are not brought within the ambit of the license.

Condition 4¹⁴⁶ is rejected in its entirety because it represents an asserted acknowledgment and quantification of the Bands' claimed water rights under the Winters doctrine and, as indicated, the Bands and Interior expressly "acknowledge that the Commission is without jurisdiction to adjudicate the merits of the existing water rights controversy between the Bands and Mutual and Vista." Condition 4 would therefore require the Commission to do indirectly what they acknowledge cannot be done directly.

Furthermore, Article 29 of the power license issued herein requires Mutual, Escondido and Vista to treat portions of the La Jolla, Rincon and San Pasqual Indian Reservations as a joint service area of Escondido and Vista, and to supply water from the Escondido Canal to that service area in such

¹⁴⁶ "That the Escondido Mutual Water Company and the Vista Irrigation District agree that they shall not infringe upon or interfere in any manner with the right of the Indian reservations to utilize the following annual quantities of water:

	25-year Annual Average	Maximum Annual Diversion
(a) La Jolla	4,990 acre-feet	7,285 acre-feet
(b) Rincon	11,140 acre-feet	16,590 acre-feet
(c) San Pasqual	3,590 acre-feet	5,210 acre-feet
(d) Pauma/Yuima (including Mission Reserve lands)	795 acre-feet	1,190 acre-feet
(e) Pala (including Mission Reserve lands)	21,679 acre-feet	31,880 acre-feet

"That the Escondido Mutual Water Company and the Vista Irrigation District recognize in their operations on the San Luis Rey River watershed that the reserved and other rights of the Indian reservations to the foregoing quantities of water from the San Luis Rey River shall at all times be prior and paramount to any and all rights of the Escondido Mutual Water Company and the Vista Irrigation District to the waters of the San Luis Rey River."

quantities as can be (over time) and are in fact (at a point in time) utilized therein. It is inappropriate under such circumstance to establish any minimum infringement quantities for those areas.

Insofar as the Pala and Pauma Indian Reservations are concerned, the permanent operating plan for Project No. 176 will consider questions pertaining to flows and/or releases to benefit the Pala and Pauma Basins. As is discussed in Footnote 119, their existing and potential water problems are more closely associated with the sharp increase in orchard acreage in the 1950's than with the diversions of the San Luis Rey waters in the 1890's and 1910's.

Furthermore, Condition 4 is impossible of fulfillment because (1) the quantities of water specified therein are the amounts which are claimed to be necessary to irrigate and otherwise utilize the respective reservations, (2) the quantities far exceed the volumes of water which historically have been subject to Mutual's and Vista' control at their respective dams, and (3) any direction of the water one way or the other at Mutual's diversion dam is bound to infringe upon or interfere in some manner with the quantities of water which are made available in the opposite direction.

Condition 5¹⁴⁷ is rejected as being inconsistent with the power license issued herein and the Commission's authority over licensed project works.

¹⁴⁷ "That no water pumped from the Warner groundwater basin shall be transported through Project No. 176 facilities without the prior written agreement of the La Jolla, Rincon, Pala, Pauma, and San Pasqual Bands of Mission Indians, which shall be subject to the approval of the Secretary of the Interior."

We agree with the sense of Condition 6¹⁴⁸ insofar as it is consistent with Article 29 of the power license issued herein requiring water to be supplied to the Indian Service Area. To the extent that irrigation of the Rincon Indian Reservation is thereby increased, the water will percolate into and benefit the Pauma Basin. And to the extent that a permanent operating plan for Project No. 176 will require releases and/or flows to maintain the La Jolla fishery during periods when the Escondido Canal is closed, such releases and/or flows will incidentally benefit the Pauma and possibly the Pala Basins. But insufficient water is available to satisfy all beneficial public uses within the affected area and, as a result, we have decided that the project which is best adapted to

¹⁴⁸ "That the Escondido Mutual Water Company and the Vista Irrigation District acknowledge that the La Jolla, Rincon and San Pasqual Bands of Mission Indians have the right at all times to take from the Escondido Conduit water for agricultural, domestic, recreational or other purposes, or for the purpose of recharging the groundwater basin upon which the Rincon Reservation relies. That the Escondido Mutual Water Company and the Vista Irrigation District will provide water for such purposes at the times and in the amounts specified by the Commissioner of Indian Affairs on an annual, monthly or daily basis. That the Escondido Mutual Water Company and the Vista Irrigation District will release water either at the diversion dam or at the Rincon penstock for the purpose of recharging the Pauma and/or Pala groundwater basin at the times and in the amounts specified by the Commissioner of Indian Affairs on an annual, monthly or daily basis. That the Escondido Mutual Water Company and the Vista Irrigation District will provide such water from any and all sources as constitute a part of the San Luis Rey River system, including storage in Lake Henshaw, in satisfaction of this condition, and that the Indian Bands shall not be limited to the so-called natural flow of the San Luis Rey River. The releases required by this condition include releases from Lake Henshaw to maintain optimum fish flows in the San Luis Rey River above the diversion dam and releases for the maintenance of water quality in the Pala and Pauma groundwater basins. The quantities supplied to the Indian Reservations shall not exceed the quantities specified in Condition No. 4 above except when, in the opinion of the Commissioner of Indian Affairs, larger quantities are required for recharge, water quality, or fishery purposes."

a comprehensive plan for beneficial public uses cannot accommodate releases of water, whether at Henshaw Dam, the diversion dam or the Rincon penstock, solely for the purpose of recharging the Pauma and Pala Basins. Condition 6 is therefore rejected to the extent that it is not consistent with Article 29, and Condition 7¹⁴⁹ is similarly rejected.

Condition 8¹⁵⁰ is rejected as an attempt by Interior to direct the Commission as to the manner of fixing annual charges for the use of tribal lands embraced within Indian reservations, contrary to the first proviso of Section 10(e) of the Federal Power Act.¹⁵¹ That proviso clearly states that the *Commission* shall fix annual charges for the use of dams and other structures owned by the United States, subject to Interior's approval when, and only when, such dams and structures are in reclamation projects. It also states that the *Commission* shall fix annual charges for the use of such

¹⁴⁹“That the Escondido Mutual Water Company and the Vista Irrigation District will make the releases required by Condition No. 6 until a court of competent jurisdiction rules that the releases need not be made.”

¹⁵⁰“That the Escondido Mutual Water Company and the Vista Irrigation District agree to pay to the La Jolla, Rincon, and San Pasqual Bands of Indians such reasonable annual charges as may be fixed by the Federal Power Commission based on the commercial value of the tribal lands involved for the most profitable purposes for which suitable, including water and power development.”

¹⁵¹The first proviso of Section 10(e) states,

“That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984), fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing”.

tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in 15 U.S.C. § 476.¹⁵²

We interpret the term “fix” in both cases as including authority to determine the manner of fixing annual charges, as well as authority to determine the amount of annual charges. Since Congress gave Interior some authority to approve annual charges and in the same proviso gave only Indian tribes authority to approve annual charges for the use of tribal lands, it appears that Congress intended that annual charges for the use of tribal lands would not be subject to Interior’s approval. Accordingly, we hold that Interior may not pass upon such annual charges by propounding a condition pursuant to the first proviso of Section 4(e) purportedly for the adequate protection and utilization of the reservation.

Interior has indicated that Condition 8 is designed to be consistent with the manner of fixing annual charges which was approved in *Montana II*.¹⁵³ The Federal Power Act, however, is silent as to how annual charges shall be computed, and the United States District Court for the District of Columbia Circuit said in *Montana I*¹⁵⁴ that the only question is “whether the end result is a reasonable one, as the statute requires it to be.” We considered fixing the annual charges herein on the basis of the most profitable use of the tribal lands involved herein, as Interior advocates. But since we are not bound to fix them in any particular manner, and since we are not bound to fix them in the same manner in every case, we have decided that the net benefits method

¹⁵²That the *Commission* has the decisional responsibilities as to both original charges and readjustments, see 445 F.2d, at page 749.

¹⁵³*Montana Power Company v. Federal Power Commission*, 445 F.2d 739 (CA-DC, 1970), cert. denied, 400 U.S. 1013 (1971).

¹⁵⁴*Montana Power Company v. Federal Power Commission*, 298 F.2d 335 (CA-DC, 1962), at page 340.

is more appropriate in this instance. See TERMS OF THE POWER LICENSE — Annual Charges, *infra*.

Condition 10¹⁵⁵ is rejected as being unnecessary with respect to Project No. 176. The right-of-way for the Escondido Canal runs through mountainous terrain on the La Jolla and Rincon Indian Reservations and, therefore, the right-of-way has no other apparent uses on those reservations. The right-of-way for that conduit through the San Pasqual Indian Reservation, on the other hand, can be used for agricultural and other purposes to the extent that it is not physically occupied by project works; but as proposed by Mutual and Escondido, a substantial part of the Escondido Canal will be rerouted from that reservation and the remaining part, running from higher to lower ground, will be fenced for safety reasons.

Condition 10 is accepted in substance, but only in part, with respect to Project No. 559. Insofar as it would permit the utilization of the SDG&E transmission line right-of-way through the Rincon Indian Reservation for agricultural, grazing and possibly other purposes, the condition would appear to be beneficial to the Rincon Band and would also appear not to interfere with the transmission line license issued herein so long as such additional utilization of the right-of-way is kept within reasonable bounds. However,

¹⁵⁵ "That the grant of any right-of-way for Project Nos. 176 and 559 across Indian land shall not preclude agricultural or other use by the Bands of any land included within the rights-of-way that are not actually utilized for the facility itself. Provided, however, that the Bands shall not erect permanent structures or make such other uses of the land which would interfere with or obstruct the licensee's access to project facilities; and further provided that the licensee or licensees agree to hold harmless the Bands, any members of the Band or other agents, employees, lessees, or assigns for any damages, whatsoever, that may be caused by the maintenance or repair of project facilities on Indian lands by the licensee or licensees."

insofar as Condition 10 would hold SDG&E to the standard of an absolute insurer if it is required to enter the right-of-way to maintain or repair its project works, it is inappropriate. Section 10(c) of the Federal Power Act provides, in pertinent part,

"All licenses issued under this Part shall be on the following conditions:

* * *

"(c) That the licensee . . . shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor."

Section 10(c) does not prescribe the standard by which a licensee's liability for damages should be determined, and the Commission's policy has been to permit the standard to be determined by the courts on a decisional basis. Accordingly, we will not undertake to fix a standard and will reject the second proviso of Condition 10.

Condition 11¹⁵⁶ is rejected as being vague, particularly with respect to the phrase "new physical or operational use", and as constituting an unlawful delegation of Commission authority to Interior and the La Jolla, Rincon and San Pasqual Bands. To the extent that the Federal Power Act requires changes in the works and/or operation of Project

¹⁵⁶ "That no new physical or operational use shall be made of the La Jolla, Rincon or San Pasqual Indian Reservations in connection with Project No. 176 operations that has not received the prior written approval of the Band, the Interior Department and the Federal Power Commission."

No. 176 to be approved by the Commission, such changes will be considered and acted upon by the Commission alone. To require all "new physical or operational use" of the three reservations to receive the approval of the Commission, Interior and the three Bands, would preclude the Commission and the licensees from acting alone when they are entitled to act alone and is not necessary to the adequate protection and utilization of the reservations in view of the protection accorded by the Federal Power Act.

And finally, while we accept the sense of Condition 12¹⁵⁷, it is rejected because it does not appear necessary to cover the portion of the Escondido Canal to remain on the San Pasqual Indian Reservation if it is to be fenced as proposed by Mutual and Escondido, and because it is not appropriate to require the destruction of a usable facility if, as suggested in Footnote 84, the San Pasqual Band chooses to utilize 12,000 feet of conduit to be abandoned. If that Band does not want to utilize the conduit to convey water through the eastern portion of the San Pasqual Indian Reservation, then the reservation should be restored by filling the canal and removing the flume structures.

Section 8 of the Mission Indian Relief Act (Article 32)

The Bands and Interior claim on exception that Section 8 of the Mission Indian Relief Act (Footnote 47, *supra*) precludes the issuance of a license to Mutual, Escondido and Vista. Upon analysis, however, their exception reduces itself to the last sentence of that section, which states,

¹⁵⁷"That the licensee shall cover all of the canal conduit remaining above ground on the San Pasqual Reservation with precast concrete sections and shall remove the unused portion of the concrete canal and flume structures no longer in use and shall restore the land."

“Subsequent to the issuance of any tribal patent, or of any individual trust patent . . . any citizen of the United States, firm or corporation may contract with the tribe, band, or individual for whose use and benefit any lands are held in trust by the United States, for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose.”

It is important to observe that Section 8 addresses the construction of “appliances for the conveyance of water”, as distinguished from their operation and maintenance, and that its apparent purpose is to assure that the Mission Indians whose reservations are occupied by such appliances would “be supplied with sufficient quantity of water for irrigating and domestic purposes upon such terms as shall be prescribed in writing by the Secretary of the Interior”. It is important to observe, additionally, that the San Pasqual Indian Reservation was patented *after* the Mission Indian Relief Act was enacted and *after* the Escondido Canal was constructed and placed into operation. Accordingly, there is no Interior or Interior-approved contract assuring the San Pasqual Band of sufficient quantity of water from the Escondido Canal. But the lack of such a contract in our opinion does not give the San Pasqual Band *de facto* veto power over a new license for Project No. 176, particularly when such a license substitutes for such a contract by assuring them of sufficient water and providing a reasonable rental for the use of their reservation.

Insofar as the power and transmission line licenses issued herein authorize the continued operation and maintenance of project works on the La Jolla, Rincon and San Pasqual Indian Reservations, we find that the licenses will not in-

terfere or be inconsistent with the purposes of those reservations insofar as those purposes are implemented by Section 8 of the Mission Indian Relief Act, because the licenses do not authorize activities for which contracts arguably are required by the last sentence of that provision. But insofar as the power license issued herein involves new construction on the San Pasqual Indian Reservation, it may require Mutual¹⁵⁸ to engage in an activity for which a contract to be approved by Interior arguably is required. We believe, however, that since the new construction will occupy a small amount of less-useful acreage of that reservation, and since it will release from servitude a considerably larger amount of more-useful acreage, Section 8 of the Mission Indian Relief Act is not applicable to the construction.¹⁵⁹ And for the same reasons, we find that the power license will not interfere with or be inconsistent with the purposes of that reservation insofar as implemented by Section 8.

Furthermore, in the light of the comprehensive regulatory scheme of the Federal Power Act, we believe that Section 8 is not applicable to appliances for the conveyance of water associated with water power projects. Section 8 does not apply on its face to works (such as dams, reservoirs and powerhouses) which are considerably more major than the appliances (flumes, ditches, canals and pipes) specified therein.

¹⁵⁸It is not necessary to decide whether Escondido and/or Vista are citizens, firms or corporations within the meaning of Section 8; they should become parties to a contract as a practicable matter.

¹⁵⁹While the apparent purpose of Section 8 is to assure that the Mission Indians whose reservations are occupied by appliances for the conveyance of water would be supplied with water from those appliances, the purpose of the instant construction is to remove such an appliance from a reservation. Section 8 would, therefore, appear not to be applicable to such construction since the apparent purpose of that provision could not be carried out.

Assuming *arguendo* that a contract is required by the last sentence of Section 8 of the Mission Indian Relief Act, such a contract is not essential to the power license issued herein. The record indicates that the Escondido Canal can be rerouted (1) around the northwest corner of the eastern portion of the San Pasqual Indian Reservation by constructing an inverted siphon, similar to Hellhole Siphon, across Paradise Creek Canyon, and (2) around the southern portion of that reservation, at a total cost of about \$1,000,000 more than the new construction proposed by Mutual and Escondido. Mutual, Escondido and Vista naturally will have to decide whether the cost is economically justifiable in the light of the other construction costs they will incur, particularly in conjunction with Henshaw Dam and the Warner Ranch well field. Alternatively, Mutual, Escondido and Vista could reroute the Escondido Canal from a point after it leaves the San Pasqual Indian Reservation (and before re-entering), thereby avoiding in another way any new construction on that reservation.

In order to avoid any question of whether a contract is required by Section 8, Article 32 of the power license issued herein requires Mutual, Escondido and Vista to use their best efforts to negotiate a reasonable contract with the San Pasqual Band and to obtain Interior's approval. If the Escondido Canal is rerouted around the San Pasqual Indian Reservation, the San Pasqual Band naturally will not be entitled to receive water from that conduit or annual charges as provided in the license.

Section 16 of the Indian Reorganization Act (Article 32)

The Bands and Interior also claim on exception that Section 16 of the Indian Reorganization Act (25 U.S.C. § 476) precludes the issuance of a license to Mutual, Escondido

and Vista, without the consent of the San Pasqual Band.¹⁶⁰ Section 16 authorizes Indians to organize for their common welfare and to adopt a constitution and bylaws to be approved by Interior, and then provides, in pertinent part,

"In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To . . . prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe. . . ."

The San Pasqual Band so organized itself and adopted a constitution which was approved by Interior on January 4, 1971, and which provides in Article VIII:

"*Section 1. The general council shall have the powers and responsibilities hereafter provided, subject to any limitation imposed by the statutes or the Constitution of the United States.*

* * *

"(c) To veto any sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other assets of the band made by any authority other than the general council."

The Bands and Interior assert, in this connection, that the Federal Power Act

"plainly *authorizes* the Commission to grant . . . rights of way and other Interests in Indian Tribal lands, but it is not automatic; it is subject to the qualifications and standards of the Federal Power Act, particularly Sections 4(e) and 10(e), as well as other laws, including treaties, defining the purposes of Indian reservations and the rights of Indian tribes." (Footnote omitted.)

¹⁶⁰The La Jolla and Rincon Bands are not organized under the Indian Reorganization Act.

While they cite legislative history, early interpretations by Interior and court decisions to indicate that the purpose of Section 16 was to give Indians control of their own affairs and property, we are apprehensive that the constitution of the San Pasqual Band falls short of that goal insofar as it subjects the general council's veto authority¹⁶¹ to the limitations imposed by the statutes of the United States, including the Federal Power Act.

Furthermore, we do not believe that Congress, on June 18, 1934, extended a veto power to organized Indians with respect to the occupation of their reservation lands by licensed project works, and then repealed that veto power on August 26, 1935, by re-enacting the first proviso of Section 4(d) of the Federal Water Power Act without change as the first proviso of Section 4(e) of the Federal Power Act, and thereby renewing the Commission's authority to issue licenses within Indian reservations after finding that the licenses will not interfere or be inconsistent with the purposes for which the reservations were created or acquired.¹⁶² We believe, instead, that such a veto power never came into existence. As is discussed in the following section of this Opinion and order, Congress changed Section 10(e) to extend certain authority to Indians with respect to annual charges, but Congress did not change the first proviso of

¹⁶¹Without deciding, it is assumed the right-of-way through the San Pasqual Indian Reservation incident to the power license issued herein would be a "disposition, lease, or encumbrance of tribal lands [or] interests in lands" within the purview of Section 16.

¹⁶²In *Winters, supra*, it was argued that the admission of Montana into the Union "upon an equal footing with the original States" pursuant to the Act of February 22, 1889, repealed the agreement of May 1, 1888, creating the Fort Belknap Reservation and reserving waters of the Milk River for the Indians. The Supreme Court said, 207 U.S., at 577, that "it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste".

Section 4(e) which was the logical place to qualify the Commission's licensing jurisdiction. Accordingly, we conclude that Congress did not in 1934 qualify the Commission's licensing jurisdiction enacted in 1920 with respect to Indian reservations.

In any event, and in the light of the facts and issues in this proceeding, there is no substantive difference between a requirement under Section 8 of the Mission Indian Relief Act that Mutual enter into a contract with the San Pasqual Band to authorize the construction of a new section of conduit, and a requirement under Section 16 of the Indian Reorganization Act that Mutual, Escondido and Vista obtain the consent of the San Pasqual Band to utilize a right-of-way through its reservation. Therefore, having decided to avoid any question of whether a contract is required by Section 8 of the Mission Indian Relief Act, we choose to avoid any question of whether such consent is required by Section 16 of the Indian Reorganization Act, for it is not essential to the power license issued herein. Article 32 of the power license issued herein requires Mutual, Escondido and Vista to use their best efforts to negotiate a reasonable contract covering Sections 8 and 16 of the two statutes.¹⁶³

Section 10(e)

Finally, the Bands and Interior claim on exception that the first proviso of Section 10(e) of the Federal Power Act (Footnote 151, *supra*), "requires the Bands' and Interior's

¹⁶³Since the Escondido Canal can be routed around the San Pasqual Indian Reservation, although at a cost, a direct conflict between the Federal Power Act and Section 8 of the Mission Indian Relief Act and/or Section 16 of the Indian Reorganization Act can be avoided. Accordingly, we will not decide whether those provisions are repealed by Section 29 of the Federal Power Act other than to the extent discussed in Footnote 140 under First Proviso of Section 4(e) — (Interference with Reservations).

approval before their lands can be included in a new license to Mutual." They say, in this connection, "that the Indian tribe's approval of annual charges is prerequisite to the issuance of a license involving Indian lands." We disagree.

As indicated in the discussion of Condition 8, *supra*, the first proviso of Section 10(e) does not require Interior's approval of annual charges for the use of tribal lands embraced within Indian reservations. It is true that the United States Court of Appeals for the District of Columbia Circuit said in *Montana I*¹⁶⁴ that Interior had a "veto power", as the Bands and Interior point out. But that "veto power" was not based on the first proviso of Section 10(e). It was based upon the Act of March 7, 1928,¹⁶⁵ which authorized the Commission to issue a license within the Flathead Reservation "upon terms satisfactory to the Secretary of the Interior". Interior thus had express authority under that statute to disapprove annual charges, among other terms, which were not considered "satisfactory". The District of Columbia Circuit said with respect to that "veto power" in *Montana II*, 445 F.2d, at page 756,

"... Before this court the Secretary had disclaimed any right to disapprove the ruling of this court.

"In our view this disclaimer is only what the law requires. The Secretary will be bound whether we affirm the Commission's ruling on the merits, or hold in favor of the Company's contention on the merits, in whole or in part."

¹⁶⁴298 F.2d, Footnote 2 at page 338.

¹⁶⁵445 F.2d, Footnote 3 at page 742.

And the District of Columbia Circuit added in Montana III¹⁶⁶, 459 F.2d, at page 874,

"The Secretary is a public figure who could not insist on withholding approval unless the rental rate to be paid were unreasonable. Considering the applicable statutes together he may approve a rental offered by the Company, and he may negotiate for an approved consensual arrangement; but if there is no agreement and the matter goes to the Commission, the Secretary can refuse to approve the rate fixed by the Commission only by seeking court review of its determination. *As is the situation with the Tribes, the Secretary can participate as a party and avail of the provisions for judicial review.*" (Emphasis added.)

The first proviso of Section 10(e) said in 1920,

"That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the commission shall fix a reasonable annual charge for the use thereof, and such charges may

¹⁶⁶Montana Power Company v. Federal Power Commission, 459 F.2d 863 (CA-DC, 1972), cert. denied, 408 U.S. 930 (1972).

The statement in Montana I, 298 F.2d, at page 340,

"The annual charges shall be reasonable, Section 10(e) says, and must be approved by the Secretary of the Interior and the Indians themselves; otherwise, the statute is silent as to how Indian rentals shall be computed,"

and the reference in Montana II, 445 F.2d, at page 756, to "the approval of the Secretary and of the Indian Tribes referred to in § 10(e) of the Act," are both consistent with our position herein that under Section 10(e) Interior approves annual charges for the use of dams and other structures in reclamation projects and Indians approve annual charges for the use of tribal lands embraced within Indian reservations. The further statement in Montana II, 445 F.2d, at page 756, that approval "is manifested initially by the concurrence with the licensee which must exist in order for the application for the original license . . . to be approved by the Commission," is dictum in view of the fact that a licensing application was not then before the District of Columbia Circuit and, in any event, is superseded by the quotation from Montana III.

be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each license”.

While Congress amended that proviso in 1935 to direct the Commission to fix annual charges for the use of tribal lands embraced within Indian reservations “subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934”, the legislative history of that amendment indicates that Congress did not address the consequences of an Indian tribe’s withholding such approval. Indeed, the language requiring such approval was not contained in either the House or Senate bill, but was introduced as a floor amendment during the Senate debate on June 11, 1935, at which time there was no discussion of the merits of the amendment. 89 Cong. Rec. 9054. Thereafter the language appeared in the Conference Report (74th Congress, 1st Session, House of Representatives, Report No. 1903) with the following explanation:

“[T]he Senate bill requires approval of the Secretary of the Interior *or* of the appropriate Indian tribe in fixing annual charges for the use of public lands *or* lands within an Indian reservation. The House amendment did not carry this provision, but it has been incorporated in the conference substitute.” (Emphasis added.)

As did the District of Columbia Circuit in *Montana II*, 445 F.2d, at page 746, we must discern the applicable legislative intent by what is necessarily an act of projection. In this instance, however, the explanations of the changes to Section 10(e) in the House and Senate Reports are not germane because the language requiring approval was not then in the respective bills.

The Bands and Interior claim, in this connection, that the 1935 amendment to the first proviso of Section 10(e) assured that Indians could exercise their newly enacted Indian Reorganization Act powers over Commission-licensed project works, including the power in Section 16 of that Act "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe". Assuming *arguendo* and contrary to our view that they are correct, then only the San Pasqual Band would have that right because Section 18 of the Indian Reorganization Act (25 U.S.C. § 478) provides that it shall not apply to any reservation wherein a majority of the adult Indians shall have voted against its application, and the La Jolla and Rincon Bands so voted.

We think that the better view is that if in 1935 Congress wanted to qualify the Commission's licensing jurisdiction with respect to tribal lands embraced within Indian reservations, logically it should have amended the first proviso of Section 4(d) of the Federal Water Power Act which clearly gave the Commission authority to issue a license "within any reservation".¹⁶⁷ As indicated, however, that proviso was reenacted without change in 1935 as the first proviso of Section 4(e) of the Federal Power Act. Certainly, if Congress wanted to qualify that authority, it would have included appropriate language in the first proviso of Section 4(e) pertaining to the Commission's licensing authority, rather than the first proviso of Section 10(e) pertaining to annual charges. In the absence of a clear indication from Congress that it was extending veto power to Indians over

¹⁶⁷The authority was and still is subject to a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired.

Commission-licensed project works¹⁶⁸, and in the absence of a clear indication of the standard by which such power would be exercised¹⁶⁹, we will not construe the first proviso of Section 10(e) as conferring such a power on Indians.

We conclude that the 1935 amendment to the first proviso of Section 10(e) confers an unqualified right upon Indians to participate in fixing annual charges for the use of their reservations, whether by negotiation, participation in an administrative proceeding or participation in judicial review.

The Bands and Interior argue on exception that under such a construction "any and all conceivable meaning would

¹⁶⁸ "The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe. . . . (3) These powers are subject to qualification by treaties and by express legislation of Congress. . . ." Felix S. Cohen's Handbook of Federal Indian Law, page 123.

The Supreme Court in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), and again in *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955), held that a State could not in effect veto a license issued under the Federal Power Act. Since States have always been considered to possess all of their sovereign powers (including their powers over external affairs) which have not been delegated to the United States, and since Indian tribes have been treated as conquered nations without powers over their external affairs, it is inappropriate in the absence of express legislation by Congress to attribute a veto power to a sovereignty without external powers when the same veto power has been denied to sovereignties with reserved external powers.

¹⁶⁹ Assuming *arguendo* and contrary to our view that Congress extended veto power to Indians with respect to licenses issued under the Federal Power Act, such power would likely be viewed by a court as an unconstitutional delegation of authority since there is no express standard by which it would be exercised. If, on the other hand, the standard of reasonableness applicable to the Commission is construed as being applicable to such veto power, then such power would entitle Indians merely to participate as parties and avail of the provisions for judicial review, as indicated by the District of Columbia Circuit in *Montana Ill.*, 459 F.2d, at page 874.

vanish from the 1935 amendment requiring the tribes' approval," for it gives them nothing to which they are not entitled under Sections 306, 308(a) and 313 of the Federal Power Act. Such an argument, however, reflects a new generation taking for granted a statutory right which they have always known. The Bands are litigating the validity of certain pre-Indian Reorganization Act contracts which were entered into by Interior on their behalf. The Act of June 18, 1934 — the Indian Reorganization Act — was the most comprehensive piece of Indian legislation in 100 years and, as noted, it conferred certain powers upon Indian tribes relative to their external affairs. After adopting a constitution approved by their guardian, Interior, an Indian tribe (the ward) could exercise the powers over its external affairs which were conferred by Section 16 of that Act and its Constitution.

Congress conferred an additional power over external affairs a year later in the 1935 amendment to the first proviso of Section 10(e). The amendment gave Indians, as distinguished from their guardian, a right to participate in fixing annual charges for the use of their reservations, including an unqualified right to negotiate contracts pertaining to annual charges and a qualified right to consummate such contracts. So long as the Commission would be satisfied as to the reasonableness of the annual charges negotiated by Indians, it could fix such charges with their approval. While the present generation of Indians may take for granted the right to act on their own behalf with respect to annual charges, the fact is that the right was conferred by statute in the mid-1930's and the Bands are now engaged in litigation because they are not satisfied with contracts entered into on their behalf prior to that time.¹⁷⁰

¹⁷⁰Furthermore, the 1935 amendment to the first proviso of Section 10(e) should be viewed as cumulative of the rights conferred in the same legislation by Sections 306, 308(a) and 313.

With respect to the further question of which Bands are conferred authority to participate in fixing annual charges, we are persuaded that the reference to "the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934," is descriptive of those who may so act. As the Bands and Interior indicate, Section 16 of the Indian Reorganization Act begins,

"Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare. . . ."¹⁷¹

That concept — Indians residing on the same reservation — was carried over into the first proviso of Section 10(e) to describe those who would have authority to approve annual charges for the use of their reservations. As the Bands and Interior indicate, the Rincon Band was the appropriate entity to vote upon organization of the Rincon Indian Reservation even though it is part of the San Luiseno Tribe and, therefore, it is also the appropriate entity to have authority with respect to annual charges for the use of that reservation. Accordingly, we conclude that even though the La Jolla and Rincon Bands are not organized under the Indian Reorganization Act and, therefore, that Act as such is not applicable to the La Jolla and Rincon Indian Reservations, nonetheless, the La Jolla, Rincon and San Pasqual Bands have authority under the first proviso of Section 10(e) of the Federal Power Act to approve annual charges for the use of their respective reservations.

TERMS OF THE POWER LICENSE

Thirty Year Term

When a new license is issued pursuant to Section 15(a) of the Federal Power Act and there is no new investment in the licensed project works, it is the policy of the Com-

¹⁷¹Section 19 of the Indian Reorganization Act defines the term "tribe" as referring to "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation."

mission to issue the license for a thirty-year term absent unusual circumstances or certain exceptions, rather than for the maximum fifty-year term authorized by Section 6.¹⁷² Substantial new investment, on the other hand, is an exception which has been held to justify a longer relicensing term.¹⁷³

While the power license issued herein contemplates the construction of 8,550 feet of 48-inch pipeline as proposed by the joint application amendment filed January 12, 1976, and the abandonment of approximately 12,000 feet of conduit on the eastern portion of the San Pasqual Indian Reservation, Mutual, Escondido and Vista may find it necessary to go to the added expense of by-passing that reservation entirely. Furthermore, additional investment will be required in the vicinity of Lake Henshaw to bring Henshaw Dam up to current safety standards and to assure a continued supply of pumped water from the Warner Basin.

Project No. 176 will therefore require some new investment, but the aggregate amount cannot reasonably be ascertained at this time. Under such circumstances, and in the light of the policy enunciated in *The Montana Power Company, supra*, we find it appropriate to issue a new power license effective as of the first day of the month in which this Opinion and order is issued, and terminating not sooner than June 24, 2004, which is thirty years from the expiration date of the initial license. Our action fixing the term at thirty years should not be construed as precluding an extension of that term is if such an extension is justified by future circumstances. That concept — Indians residing on the same

¹⁷²Order issued October 5, 1976, in *The Montana Power Company*, Project No. 2301, 56 FFC

¹⁷³*South Carolina Electric & Gas Co.*, Project No. 1894, 52 FPC 537 (1974).

reservation — was carried over into the first proviso of Section 10(e) to describe those who would have authority to approve annual charges for the use of their reservations. As the Bands and Interior indicate, the Rincon Band was the appropriate entity to vote upon organization of the Rincon Indian Reservation even though it is part of the San Luiseno Tribe and, therefore, it is also the appropriate entity to have authority with respect to annual charges for the use of that reservation. Accordingly, we conclude that even though the La Jolla and Rincon Bands are not organized under the Indian Reorganization Act and, therefore, that that Act as such is not applicable to the La Jolla and Rincon Indian Reservations, nonetheless, the La Jolla, Rincon and San Pasqual Bands have authority under the first proviso of Section 10(e) of the Federal Power Act to approve annual charges for the use of their respective reservations.

License to be Amended (Article 27)

Article 27 embodies the substance of Interior's Condition 1¹⁷⁴ to reflect the inclusion of Henshaw Dam and Lake Henshaw within the ambit of the power license issued herein, together with the lands and other facilities, including the pumping facilities, which are associated with their operation and maintenance and the water rights which are incident thereto. See JURISDICTION — The Henshaw Facilities and Water Rights.

The California Department of Water Resources, Division of Safety of Dams, requires Lake Henshaw to be restricted

¹⁷⁴ "That Henshaw Dam and Lake Henshaw, together with all wells, pumps, and other physical facilities belonging to the Escondido Mutual Water Company and/or the Vista Irrigation District which are or may be utilized to draw water from the Warner groundwater basin, be included as part of the project works in any new license for Project No. 176 to the Escondido Mutual Water Company, the City of Escondido, and/or the Vista Irrigation District."

to 10,000 acre-feet until appropriate modifications are made to comply with current safety standards. Because that restriction impairs the water storage value of Lake Henshaw, and because Vista has proposed certain modifications to eliminate that restriction, Article 27 provides for consideration of Vista's and other possible proposals to cause Henshaw Dam and its associated facilities to be structurally sound, safe and adequate.

Similarly, Vista has proposed alternative plans for modifying the facilities and operations for pumping groundwater from the Warner Basin.¹⁷⁵ Article 27 provides for consideration of Vista's and other possible proposals and, to the extent found appropriate, for fixing the amount of groundwater which may be extracted from that basin. It provides, additionally, for the development of a permanent operating plan for the Warner Basin and for authorization of such facilities as may be appropriate to implement that plan. But, as is discussed under COMPLIANCE ISSUES — Cease and Desist Order, *infra*, replacements of deteriorating facilities are not precluded pending Commission approval of a permanent operating plan.

Article 27 provides, additionally, for consideration of a permanent water operating plan for Project No. 176 under which the comprehensive plan adopted herein will be refined to maximize its benefits and minimize its liabilities. Since

¹⁷⁵Although Warner Basin clearly is licensable as a subsurface "reservoir" as that term is used in the definition of "project" in Section 3(11) of the Federal Power Act, we believe that we can discharge our regulatory responsibilities if the licensed project works associated with the pumping activity include the pumping facilities, the pipelines and ditches connecting such facilities with Lake Henshaw and the narrow strips of land on which such facilities, pipelines and ditches are situated. If, on the other hand, water is injected into Warner Basin for storage, we would give further consideration to what additional lands and facilities, if any, would have to be brought within the ambit of the license to enable us to discharge our regulatory responsibilities.

Lake Henshaw is the only headwater impoundment of the project and has not been licensed previously, multi-year and annual operating regimes for Lake Henshaw and Henshaw Dam must be developed, presumably in conjunction with a permanent operating plan for the Warner Basin, for regulating the storage and release of water within different time frames and in the light of changing conditions of precipitation.

Consideration should be given to providing year-round fishery benefits on the San Luis Rey River between Henshaw Dam and the diversion dam by releasing water primarily for that purpose¹⁷⁶ during periods when the Escondido Canal is closed for maintenance and repair, which ordinarily occurs during September, October and November. The issues should focus on how much water will be required to maintain the necessary continuity of flow, and whether the benefits to be derived will outweigh or be outweighed by other beneficial public uses of the same quantity of water. Consideration should also be given to maximizing the fishery benefits throughout the year (whether for 9 or 12 months) by operating Henshaw Dam in such a manner as to minimize hourly and/or daily fluctuations and produce as constant a flow as is feasible consistent with other beneficial public uses of the water.

Although the amount of power generated by Project No. 176 could be increased by more than 1,000,000 kilowatt-hours a year by operating the project for that purpose, it is primarily a water supply project and we do not propose to

¹⁷⁶Releases of water to maintain a fishery when the Escondido Canal is closed would incidentally benefit the Pauma and Pala Basins. If the Escondido Canal is opened to the Rincon diversion facility while maintenance and repairs proceed on its lower reaches, fishery releases can be routed through the Rincon powerhouse to generate power while still benefiting the Pauma and Pala Basins.

cause it to be operated otherwise. Nonetheless, if the amount of electricity generated can be increased consistent with the operation of the project for water supply, appropriate measures should be taken. For example, if two cfs of water are to by-pass the Rincon powerhouse for irrigation purposes for a given period of time, consideration should be given to whether the same or equivalent irrigation results can be achieved by passing three cfs of water *through* the Rincon powerhouse for a shorter period of time.¹⁷⁷ As part of a permanent water operating plan, Article 27 contemplates the possible construction or installation of relatively minor facilities, to the extent feasible, for modifying flows through the powerhouse for the purpose of enhancing the generation of electric power consistent with other beneficial public uses of the water.

Licensees to Provide Water (Article 29)

Article 29 is designed to preclude any possible interference or inconsistency of the power license issued herein with the purpose for which the La Jolla, Rincon and San Pasqual Indian Reservations were created, in the light of the claim, as noted, that "Any water that Mutual is licensed to take through Indian lands that could otherwise be utilized by the Bands necessarily interferes with the utilization of the reservation by the Indians."

—(Authority)

In the Commission's judgment under Section 10(a) of the Federal Power Act, as already discussed, the project which is best adapted to a comprehensive plan for beneficial public uses will be secured, not by the issuance of a license to the

¹⁷⁷ Perhaps a small amount of pondage, less than the storage proposed by the Bands for Paradise Creek, would provide an economic aid for modifying the flows.

Bands or by takeover by the United States, nor by the issuance of the power license proposed by Mutual and Escondido, but by the issuance to Mutual, Escondido and Vista of a modified version of that power license. Article 29 is bottomed principally on the Commission's authority under Section 10(a) "to require the modification of any project" if the modification is necessary to secure the project which in the Commission's judgment is best adapted to a comprehensive plan for beneficial public uses.

Having decided that none of the proposals, as made, will secure a suitable comprehensive plan, we read Section 10(a) as directing the Commission to condition the best adaptable of them, which, in this case, is the power license proposed by Mutual and Escondido, in any reasonable manner deemed necessary by the Commission to enable it to make the finding under Section 4(e), among others, that the power license issued herein will not interfere or be inconsistent with the purpose for which the La Jolla, Rincon and San Pasqual Indian Reservations were created.

The Commission has authority under Section 10(a) to require the modification of any "project", and the term "project" is defined under Section 3(11) as including all water rights, the use of which are necessary or appropriate in the operation of the complete unit of development which is the "project". Accordingly, we conclude that the Commission has authority under Section 10(a) to require the modification of water rights incident to a project if such modification is necessary to enable the Commission to make a finding under Section 4(e) that a license will not interfere or be inconsistent with the purpose for which a reservation was created or acquired.

Section 10(a) is precisely the type of specific congressional directive to which the Supreme Court was referring in *California v. United States, supra*, (Slip Opinion, at page 22, footnote),

“In previous cases interpreting § 8 of the 1902 Reclamation Act, however, this Court has held that state water law does not control in the distribution of reclamation water *if* inconsistent with other congressional directives to the Secretary. See *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958); *City of Fresno v. California*, 372 U.S. 627 (1963). We believe this reading of the Act is also consistent with the legislative history and indeed is the preferable reading of the Act. See *infra*, n. 25.”

and (Slip Opinion, at page 26, footnote),

“ . . . See n. 19, *supra*. *Ivanhoe* and *City of Fresno* read the legislative history of the 1902 Act as evidencing Congress’ intent that specific congressional directives which were contrary to state law regulating distribution of water would override that law. Even were this aspect of *Ivanhoe res nova*, we believe it to be the preferable reading of the Act.”

Furthermore, the Supreme Court in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, *supra*, indicated, 328 U.S., beginning at page 167, that the Commission’s actions under Section 10(a) would supersede State law. See Footnote 98, *supra*. In *Portland General Electric Co. v. Federal Power Commission*, *supra*, the United States Court of Appeals for the Ninth Circuit held that Section 27 does not preclude the Commission from imposing conditions pursuant to its power specifically vested by Section 11. See Footnote 95, *supra*. And in *State of California v. Federal Power Commission*, 345 F.2d 917 (CA9, 1965), cert. denied, 382 U.S. 941, the same court held, 345 F.2d, at pages 923-4, that Section 27 does not preclude the Commission from attaching conditions to a license pursuant to Section 10(a) which may impair the use of irrigation water rights.

Article 29 is bottomed, additionally, on Section 10(g) and the National Environmental Policy Act of 1969. See LICENSING ISSUES — Socio-Economic Issue. As discussed herein, it is the vehicle through which the Commission is able to find under the first proviso of Section 4(e) that the license will not interfere or be inconsistent with the purpose of the reservations and, consequently it is the price in water of the power license issued herein.

—(*Interference/Inconsistency*)

The La Jolla, Rincon and San Pasqual Indian Reservations were created for the purpose of providing permanent homes for the members of those respective Bands where they can be economically self-sufficient. The concept of economic self-sufficiency requires that the three reservations have adequate supplies of water for domestic, agricultural, stock-watering and small commercial consumption by the members of those Bands who choose to earn their livings on reservation lands. The first proviso of Section 4(e) does not require that adequate supplies of water be furnished to the three reservations if such supplies do not otherwise exist. It requires only that the power license issued herein may not interfere or be inconsistent with those supplies.¹⁷⁸

Insofar as the Henshaw facilities impound the natural flow of San Luis Rey tributaries, the resulting evaporation of the impounded waters reduces the overall flow of the river through the La Jolla and Rincon Indian Reservations. But that evaporation loss is offset by the waters which are pumped from the Warner Basin. And Henshaw Dam makes it pos-

¹⁷⁸As a practicable matter interference and/or inconsistency may be more arguable than real, or, if real, may not be susceptible of quantification, as is the case herein. As a result, the practicable way to avoid such interference and/or inconsistency is to furnish sufficient water to offset possible adverse effects of a project on existing water supplies.

sible to store San Luis Rey water from wet to dry seasons and, within limits, from wet to dry years. On balance, operation of the Henshaw facilities results in no net loss of the overall flow of the river through the La Jolla and Rincon Indian Reservations. Operation of the Henshaw facilities produces a sufficiently regular flow of the river to permit it to be stocked annually for fishing, including the La Jolla Indian Reservation from the eastern boundary to the diversion facilities. And operation of the Henshaw facilities does not impair or interfere with the water supply of that reservation from the eastern boundary to the diversion facilities.

The diversion facilities obviously reduce the flow of the San Luis Rey River through the southwestern portion of the La Jolla Indian Reservation. That area is mountainous and away from the population center of the reservation which, historically, has never been irrigated with San Luis Rey water. Although that area was not considered irrigable in 1924, the local technology of citrus and avocado orchards now appears to favor sloping rather than flat terrain and, as a result, the southwestern portion of the La Jolla Indian Reservation is claimed to be irrigable for those long term crops. Irrigation of those crops from the San Luis Rey River, however, would require considerable investment in pumping and other facilities to raise the water several hundred feet, and would be non-existent or of inadequate regularity during the summer under conditions of both natural flow and the Henshaw-controlled flow as reduced by the diversion facilities. As a result, the impairment or interference with the La Jolla water supply resulting from operation of the diversion facilities appears to be more speculative than real. Nonetheless, there is arguably some impairment. But that impairment can be offset with regular gravity flows from the Escondido Canal in view of the elevation and location of that waterway.

The San Pasqual Indian Reservation is partly outside the San Luis Rey watershed and would not have San Luis Rey water available to its members in the absence of the Escondido Canal. It obtains water for domestic purposes from Valley Center Municipal Water District and from private wells. As a result, it is difficult to comprehend how a license to operate and maintain Project No. 176 would interfere or be inconsistent with that reservation's water supply.

The Rincon Indian Reservation, on the other hand, is the subject of a classic case of impairment in the absence of a protective condition, such as Article 29. Historically, the members of the Rincon Band were farmers and irrigated their reservation by means of ditches from the San Luis Rey River. In 1892 the Rincon Band appropriated 2,000 miners inches¹⁷⁹ from the river "to be used on the Rincon Indian Reservation and adjacent country for irrigation Mechanical and domestic purposes."¹⁸⁰ In 1894 Escondido Irrigation District agreed to furnish an "ample supply and quantity of water" to the Rincon Band, free, "so long as the Indians shall reside upon the said reservations. . . ."¹⁸¹

In 1914 the foregoing "ample supply and quantity of water" was quantified as to flow¹⁸² when Mutual agreed that the Rincon Band was entitled to "a minimum flow of six cubic feet of water per second of time . . . and, in extremely dry years, a minimum flow of three cubic feet of water per second of time for the months of July, August,

¹⁷⁹The Rincon Band's appropriation is 1/50 of the aggregate amount of Mutual's predecessor's appropriations, or 82.86 acre-feet per year based upon the 1912 quantification of Mutual's predecessor's appropriations.

¹⁸⁰The quotation may not be precise since it is taken from an exhibit which is a reproduction of a handwritten document.

¹⁸¹The agreement was also applicable to the La Jolla Band.

¹⁸²The Rincon Band's entitlement was not quantified as to annual volume, as was Mutual's entitlement in 1912.

and September of each such extremely dry year." In 1922 Henshaw acknowledged the Rincon Band's right to the first six second feet of natural flow. But later that year his successor, San Diego County Water Company, agreed to maintain a continuous flow of 6 cfs at Mutual's intake from January through June, and caused Mutual to agree to deliver from July through December the amounts which had been quantified in 1914.

The latter agreement, dated November 10, 1922, was a milestone in the impairment of the Rincon Band's "ample supply and quantity of water," for it operated without the participation of the Rincon Band as a settlement of the benefits which would result from the construction and operation of the Henshaw facilities. As part of that settlement Mutual agreed to extend the conveyance benefits of the Escondido Canal to the San Diego County Water Company in consideration for a sale to Mutual of stored water for summer delivery. While Mutual thereby acquired summer water for itself, it agreed to satisfy the Rincon Band's entitlement from its (Mutual's) natural flow water principally during periods in which there is little or no natural flow, or in which the Escondido Canal is closed for maintenance and repairs. Although the Rincon Band appropriated San Luis Rey water two decades before Henshaw, the Band was effectively denied any storage benefits in Lake Henshaw.¹⁸³

In 1915, about a year after the Rincon Band's entitlement was quantified as to flow, a measuring device was installed near the intake of the Escondido Canal; but that device was washed away by a record flood in 1916 and was never

¹⁸³In retrospect, it is easy to see that the Henshaw facilities should have been licensed under the Federal Power Act and that the license should have required the storage benefits of the impoundment to be extended to all prior appropriators of San Luis Rey waters.

replaced. As a result, the natural flow of the San Luis Rey River at the intake was never measured, and the construction of Henshaw Dam in 1922, nine miles upstream, precluded the natural flow from ever being measured. Thereafter, substitute measurements were taken during periods of low flow on the West Fork of the San Luis Rey River at or about the point where it enters Lake Henshaw.¹⁸⁴

The stage was thereby set for the final impairment of the Rincon Band's "ample supply and quantity of water." Pumping of the Warner Basin was begun in 1950 and adversely affected the level of the groundwater where the West Ford of the San Luis Rey River enters Lake Henshaw. As a result, some of the surface flow percolated into the basin, reducing the surface flow for delivery to the Rincon Band. That situation persisted until the so-called Powell Formula was developed during the course of this proceeding to make adjustments for the Rincon Band's entitlements.

In view of the physical changes to the San Luis Rey basin, it is not possible to measure the natural water supply of the Rincon Indian Reservation. And because that supply cannot be measured, there is no standard by which to judge possible impairment or interference by a power license such as the one issued herein, but without a protective condition. Insofar as the natural water supply consisted of diversions from the San Luis Rey River, that supply was insufficient and of inadequate regularity in the summer to irrigate 2,000 acres of the Rincon Indian Reservation, as is proposed under the Bands' plan for a nonpower license. The diversion facilities

¹⁸⁴Such measurements would have to be adjusted for the evaporation factor of Lake Henshaw and for unmeasured inflows between Henshaw Dam and the diversion dam. Furthermore, the agreement of November 10, 1922, requires measurements on all tributaries of the San Luis Rey River, not just the West Fork. Accordingly, the total flow into Lake Henshaw was never measured.

reduce the flow of the San Luis Rey River through the Rincon Indian Reservation and thus deprive that reservation of surface flows under both natural and Henshaw-controlled conditions,¹⁸⁵ as well as groundwater resulting from the percolation of surface flows. Of course, some of the diversions through the Escondido Canal are earmarked for delivery to the Rincon Indian Reservation through the Rincon penstock. Although those deliveries are now measured under the Powell Formula, that formula was devised to make adjustments for the Rincon Band's entitlement as quantified in part in 1914 and embodied into Mutual's 1924 license. Assuming that that entitlement was adequate in 1914, it will become inadequate if the members of the Rincon Band can demonstrate that they can bring 2,000 acres of their reservation under irrigation in 25 years, requiring a peak demand of 17 cfs, as they claim in this proceeding.

Although we are unable to quantify the extent to which a new power license would interfere or be inconsistent with the water supply of the Rincon Indian Reservation, we find on balance, and particularly in the light of the erosion of the Rincon Band's "ample supply and quantity of water" prior to and during the term of Mutual's 1924 license, that interference or inconsistency is unavoidable unless a new license is conditioned to preclude such a result. Whether or not 2,000 miners inches was adequate in 1894, or 6 cfs was adequate in 1914, the fact is that Project No. 176 reduces the surface and subsurface flows of the Rincon Indian Reservation. The practicable solution to that unquantifiable interference or inconsistency is to provide that reservation with

¹⁸⁵The deprivation of surface flows has a beneficial effect insofar as the La Jolla and Rincon Indian Reservations are protected from floods. But the parties agree that the Rincon Band was shortchanged in its water entitlement under Mutual's 1924 license, and the controversy centers on the amount rather than the existence of the shortfall.

an adequate supply of water. We find, therefore, pursuant to Section 10(a), that it is necessary to modify Project No. 176, and particularly the water rights used and useful in connection therewith, in order to secure the project which is best adapted to a comprehensive plan for beneficial public uses.

—(*Indian Service Area*)

The "Indian Service Area" is both a geographic area which is approximated by shading on Appendix A and a concept under which portions of the La Jolla, Rincon and San Pasqual Indian Reservations are to be furnished water to avoid arguable or unquantified interferences or inconsistencies, in the cases of La Jolla and Rincon, and to induce any permission which arguably may be required under the Mission Indian Relief Act and the Indian Reorganization Act, in the case of San Pasqual.

The demands of the Escondido and Vista service areas regularly exceed the capacity of the San Luis Rey River to supply water through the Escondido Canal, and the resulting shortfalls are satisfied by purchases from MWD and deliveries through the San Diego Aqueducts. Consequently, every additional acre-foot of water which is utilized by an existing or new customer must be obtained from MWD. Similarly, every acre-foot of water which is utilized by an Indian must be replaced by an acre-foot obtained from MWD. In both cases—additional consumption by existing or new customers, and new consumption by Indians—the effect upon the volumes and costs of the Escondido and Vista distribution systems will be as small, or as great, and as slow, or as fast, as the additional or new consumption places demands upon the systems. It is therefore apparent that the Indians along the Escondido Canal can be furnished water to meet their requirements throughout the term of the power

license issued herein without affecting the Escondido and Vista distribution systems differently from the other demands which are placed upon those systems.

There are several origins to the concept of furnishing the Indians along the Escondido Canal with sufficient water to meet their requirements.

First, the agreement of February 2, 1914, which quantified the Rincon Band's six cubic feet per second entitlement, was incorporated into Mutual's 1924 license on Interior's recommendation. Today, however, Interior says that the continued efficacy of that contract, among others,¹⁸⁶ is subject to serious legal challenge.¹⁸⁷

Second the presiding judge would incorporate the agreements of February 2, 1914, and June 28, 1922, into a new license, apparently to require six cubic feet of natural flow to be delivered to each of the Rincon and Pala Bands, and would require in his Article 40 that an equal quantity of water be delivered for the use of the other Bands. Mutual, Escondido and Vista vigorously oppose his Article 40 principally on the ground that it is precluded by Section 27 of the Federal Power Act, but also because it is unreasonable and ambiguous. Principally because of a lack of clarity, we agree with them that the presiding judge's proposed condition should be rejected.

Third, the agreements of June 4, 1894, February 2, 1914, and June 28, 1922, are natural starting points for determining the volumes and/or flows of water which would preclude a power license from interfering or being inconsistent with

¹⁸⁶The other contracts are dated June 4, 1894, providing an "ample supply and quantity of water" for the La Jolla and Rincon Bands, and June 28, 1922, recognizing the prior first rights of the Rincon and Pala Bands to six cfs of natural flow.

¹⁸⁷The challenges are premised principally upon legal technicalities in the execution of the contracts.

the purpose of the reservations; but, as indicated, the continued validity of those agreements is questionable and they are subject to various degrees of ambiguity. Perhaps the most serious obstacle to such a quantification is that any resolution of volumes and/or flows might be characterized as an adjudication of water rights, which the parties agree is not within the scope of this proceeding.

And fourth, Article 14 of Mutual's 1924 license provides,

"The Licensee will interpose no objections to, and will in no way prevent, the use of water for domestic purposes or corporations occupying lands of the United States under permit along or near any stream or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by this license."

That provision is a predecessor to Article 18 of the Commission's Form L-16 (as revised October 1975) standard license conditions which are attached to and made a part of the power license issued herein, and to Article 18 of other standard license conditions enumerated in 18 CFR § 2.9. Members of the La Jolla, Rincon and San Pasqual Bands living upon lands individually patented to them along or near the Escondido Canal are clearly persons occupying lands of the United States "under permit" within the meaning of the 1924 and current provisions and, as such, they are clearly entitled to use water from the Escondido Canal for domestic purposes. Arguably, all of the members of those Bands living upon lands patented to the respective Bands are entitled to use water from the Escondido Canal for domestic purposes. And since the provision in question dates back to a period in which our country was more agrarian than at present, arguably the use of the water for domestic purposes would include its use for agricultural and

stockwatering purposes incident to the occupation of the lands.¹⁸⁸

Article 29 attempts to satisfy the requirement of the first proviso of Section 4(e) that the power license issued herein may not interfere or be inconsistent with the water supplies of the La Jolla, Rincon and San Pasqual Indian Reservations, in the light of the obstacles in determining the historic natural supplies of those reservations and the controlled supplies which would preclude such interference or inconsistency, both currently and for the term of the license. It is essentially a merger of the 1894 principle of providing an "ample supply and quantity of water" and Article 18 of Form L-16 (as revised October 1975) which allows at least some of the Indians along the Escondido Canal to take some of the water from that conduit. Article 29 supplements Article 18 insofar as it renders it unnecessary for the Commission to decide upon the parameters of Article 18, including, whether only some, or all, of the Indians can take water; whether only some, or all, of the reservation lands are covered; and whether agricultural and stockwatering consumption is included within "domestic" consumption.

Since portions of the La Jolla and Rincon Indian Reservations are disadvantaged in their water supplies by the diversion into the Escondido Canal, the Indian Service Area is defined as including those portions of those reservations which are downstream from the crest of the spillway of the diversion dam, which geographic area approximates the portions of those reservations which are so disadvantaged. As an inducement to holding down costs in relocating part of the Escondido Canal, the Indian Service Area also includes portions of the San Pasqual Indian Reservation which are or will continue to be occupied by that conduit, which oc-

¹⁸⁸The current provision allows the use of the water for "sanitary and domestic purposes", as well as for fire suppression.

cupation arguably¹⁸⁹ requires the consent of the San Pasqual Band under the Indian Reorganization Act. If the conduit is relocated entirely off that reservation, the specified portions thereof will no longer be included within the Indian Service Area.

The Indian Service Area as so defined includes the small portion of the La Jolla Indian Reservation which would be irrigated from the Escondido Canal under the Bands' proposal for a license,¹⁹⁰ and substantially all of the Rincon Indian Reservation. It also includes approximately half of the irrigable lands of the San Pasqual Indian Reservation, which also approximates the portion of that reservation which lies within the San Luis Rey watershed.¹⁹¹

—(*Diversions of Water*)

Article 29 does not limit the volumes and flows of water which may be diverted from the Escondido Canal, other than the limits imposed by the Commission authorization

¹⁸⁹See LICENSING ISSUES—Section 16 of the Indian Reorganization Act. Although it is reasonable to relocate part of the Escondido Canal off the San Pasqual Indian Reservation in order to make the land available for reservation purposes, there is no reason to authorize its relocation completely off that reservation other than to preclude the San Pasqual Band from having a possible *de facto* veto over the power license issued herein. The annual charges provided herein may not be sufficient inducement for their consent. Accordingly, it is reasonable to modify Project No. 176 pursuant to the authority of Section 10(a) to provide water to the San Pasqual Band as an added inducement for their consent.

¹⁹⁰Mutual, Escondido and Vista contend that the 1894 agreement is still in force as to the La Jolla Band and, therefore, the La Jolla Band can tap the Escondido Canal at reasonable places to make beneficial use of water for domestic and agricultural purposes.

¹⁹¹Article 28 contemplates a possible redesignation of the "Indian Service Area" in conjunction with or following the final disposition of the pending litigation involving the water and related contractual rights which are incident to Project No. 176.

for a particular diversion.¹⁹² It contemplates that the limits will be increased from time to time as the Indians demonstrate that they are utilizing their existing limits, or are approaching those limits, and consequently that they need higher limits to satisfy their reasonably foreseeable needs.¹⁹³ And it provides water during the summer whenever there are sufficient volumes and flows in the Escondido Canal, and flexibility for changing needs and technology.

All water diverted pursuant to Article 29 must be utilized within the Indian Service Area for domestic, agricultural, stockwatering and/or small commercial consumption. "Small commercial" consumption includes any business which reasonably services the changing populations of the reservations and surrounding areas. No water diverted pursuant to Article 29 may be sold or otherwise disposed of for consumption out of the Indian Service Area or for purposes

¹⁹²But Article 28 contemplates limits being placed upon such volumes and/or flows in conjunction with or following the final disposition of the pending litigation involving the water and related contractual rights which are incident to Project No. 176. Until then, it is anticipated that any diversions in excess of the historic diversions will not be substantial because the three Bands do not have sufficient funds for irrigation facilities and agricultural development to make substantial use of the water, and because it is unlikely that they can obtain such funds so long as their water and related contractual rights are being litigated.

¹⁹³The first proviso of Section 4(e) and the Winters doctrine have a common denominator in that both look toward the purpose for which a reservation is created. Since the Winters doctrine involves a reservation of the use of water, as distinguished from an appropriation, a junior appropriator may use the water until it is presently needed for the purpose of a senior reservation of the water. *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (CA9, 1956). Assuming, therefore, that the La Jolla, Rincon and San Pasqual Bands have reserved water rights which are senior to the appropriated water rights of Mutual and Vista, the Winters doctrine would not preclude Mutual and Vista from diverting the water for consumption in their respective service areas as long as, and to the extent that, the water is not presently needed for the purpose of the three reservations. Article 29 is, therefore, consistent with whatever Winters doctrine rights the three Bands might have.

other than those specified in Article 29.¹⁹⁴

Article 29 does not preclude Mutual, Escondido and Vista from closing the Escondido Canal or portions of it for reasonable periods of time for scheduled maintenance and both scheduled and unscheduled repairs, or for other prudent reasons. Nor does it preclude them from restricting the flow in the Escondido Canal pursuant to any operating plan which is approved under Article 27. Furthermore, Article 29 recognizes the geographic differences between the Indian Service Area and the Escondido and Vista service areas, and does not require distribution services within the Indian Service Area, such as filtration, flouridation and year-round service. The Indians must make arrangements and pay for those services to the extent available if they are desired. In particular, the Indians must be prepared to obtain water from other sources when the Escondido Canal is closed.

—(*Authorization of Diversions*)

All diversions of water pursuant to Article 29 must be authorized in writing by the Commission, first, to enable the Commission to pass upon modifications of project works, and second, to enable Mutual, Escondido and Vista to plan their needs in the light of authorized volumes and flows.

¹⁹⁴Since water is reserved under the Winters doctrine to fulfill the purpose for which a reservation is created, and since the quantity of water which is so reserved is "enough . . . to irrigate all the practicably irrigable acreage" (*Arizona v. California*, 373 U.S. 546, 600), it is reasonable to assume that the water cannot be sold for off-reservation consumption. Indeed, in *Tweedy v. The Texas Company*, 286 F. Supp. 383 (D. Mont., 1968), the court refused to award damages for an appropriation (taking) of water from the Blackfeet Reservation, stating (at 386), "the plaintiffs have demonstrated no use of the water and no need for it—they have shown no right which the defendant has invaded." By refusing to award damages, the court refused to condone a sale of the water which had been taken and which was not then needed to fulfill the purpose for which the reservation was created.

Diversions by or on behalf of the La Jolla, Rincon and San Pasqual Bands, or enrolled members or groups of members of the respective Bands evidencing written authority to apply for diversion authorization, may be authorized by the Commission, or its designees pursuant to delegated authority. Diversions by or on behalf of Indian-oriented corporations or other entities must be authorized by the Commission proper. The latter are not specifically mentioned in Article 29 and will be considered on a case by case basis upon proof that the diversions will inure to benefit of the respective Bands and/or their members.

Article 29 establishes the basic right to divert water from the Escondido Canal and contemplates that authorization of such diversions will become routine. It contemplates that requests for specific volumes and flows, and plans and specifications for any diversion facilities to be installed or constructed, will be presented to and approved by Mutual, Escondido and Vista before being submitted to the Commission. Requests for specific volumes and flows should be based upon current utilization and realistic plans to expand utilization during a reasonable foreseeable period, such as five years. When the limits have been reached, or in anticipation of reaching them, either before or after the end of that period, requests for new specific volumes and flows may be made. Plans and specifications for diversion facilities, on the other hand, may look further to the future as it would not appear prudent to enlarge diversion facilities with each enlarged diversion entitlement. Such requests, and any objections to the requested volumes and flows or diversion facilities, ordinarily will be acted upon by the Commission, or its designees pursuant to delegated authority.

—(*Monitoring Diversions*)

The devices for monitoring compliance with Article 29 and the authorizations thereunder are to be installed, operated and maintained at the expense of those to whom the

authorizations are granted. Furthermore, Mutual, Escondido and Vista are to have reasonable access to the La Jolla, Rincon and San Pasqual Indian Reservations and the monitoring devices to enable them to make sure that water diverted pursuant to Article 29 is not sold or otherwise disposed of for consumption out of the Indian Service Area or for purposes other than those specified in Article 29.

We expect that the Pala and Pauma Bands, among others whose lands overlie the Pala and Pauma Basins, will benefit from the increased percolation of irrigation waters into the Pauma Basin incident to increased irrigation of the Rincon Indian Reservation resulting from Article 29. Such benefits are contemplated by the comprehensive plan for beneficial public uses which is adopted herein. Irrigation of the Rincon Indian Reservation principally for the purpose of recharging the Pauma Basin, on the other hand, is not contemplated and, in fact, is a prohibited use of the water. Although the amount of water applied to the Rincon Indian Reservation over time and in the light of particular acreage, crops and soil types could prove to be a sensitive aspect of monitoring, nonetheless, such monitoring is contemplated by Article 29.¹⁹⁵

Annual Charges (Article 30)

Annual charges for reimbursing the United States for the cost of administering Part I of the Federal Power Act, and for compensating the United States for the use, occupancy and enjoyment of its lands other than tribal lands embraced within Indian reservations, ordinarily are determined in accordance with 18 CFR §§ 11.20 and 11.21 and are not,

¹⁹⁵The reduction of annual charges incident to excessive irrigation should operate as a deterrent.

therefore, in issue.¹⁹⁶ Annual charges for the use, occupancy and enjoyment of tribal lands embraced within Indian reservations are determined in accordance with Section 10(e) of the Federal Power Act, and are subject to the criterion therein that they must be "reasonable". The United States Court of Appeals for the District of Columbia Circuit said, in this connection, in *Montana I*, *supra*, 298 F. 2d, at page 340,

"The question is . . . whether the end result is a reasonable one, as the statute requires it to be."

All of the parties are in general agreement that the annual charges or rentals for the tribal lands should be related to their value. Mutual, Escondido and Vista would utilize the fair market values of the lands, arguing that values are utilized by the Commission in 18 CFR § 11.21 in fixing annual charges for lands of the United States other than tribal lands. The Bands and Interior, on the other hand, would relate the annual charges for the tribal lands to the value of Project No. 176 as measured by the water benefits and part of the power benefits conferred upon Mutual, Escondido and Vista by the power license issued herein. Variations of the "sharing of the net benefits" approach, as it is called, are supported by the Commission staff through two witnesses.

— ("Fair Market Value" Rejected)

Under the fair market value concept of Mutual, Escondido and Vista, the mountainous lands of the La Jolla and Rincon Indian Reservations have relatively low values and com-

¹⁹⁶Nonetheless, in the special circumstances of this case and as permitted by § 11.21(b), we find that conditions warrant an adjustment from the regulatory formula and that the United States should be compensated for the use, occupancy and enjoyment of its lands other than tribal lands embraced within Indian reservations, in the same manner as such tribal lands.

mand commensurately low annual charges (\$80 for La Jolla and \$2,250 for Rincon), while the comparatively flat lands of the San Pasqual Indian Reservation have a relatively high value and command a commensurately high annual charge (\$7,600).

We do not doubt that the mountainous lands of the La Jolla and Rincon Indian Reservations have lower unit market values than the flatter lands of the San Pasqual Indian Reservation, but those mountainous lands are unique in that they contain the only known gravity route for a water conduit from the point of diversion to Lake Wohlford. A study in the record indicates that topographic factors preclude an economic rerouting of the Escondido Canal so that it would not occupy the three Indian reservations. If that is so, the lands of those reservations occupied by the Escondido Canal have unique values which are greater than and distinguishable from their fair market values.¹⁹⁷

The same study indicates that 58% of the total rerouting cost would be attributable to the mountainous lands of La Jolla, 31% to the mountainous lands of Rincon and only 11% to the comparatively flat lands of San Pasqual. If the relative cost of rerouting the Escondido Canal around the respective reservations is a criterion of the relative values of the lands of those reservations to Project No. 176, the application of fair market values to those lands does not produce a reasonable result. The more mountainous lands with the lowest unit market values would have the greatest relative value to the project, and the comparatively flat lands

¹⁹⁷The study suggests that the use of the mountainous La Jolla and Rincon lands for a water conduit is the most profitable use for which they are suitable, and that the flatter San Pasqual lands might be suitable for uses which are more profitable than conveying water. See the discussion of Interior's Condition 8 under LICENSING ISSUES — First Proviso of Section 4(e) — Interior's Conditions.

with the highest unit market values would have the lowest relative value to the project.

We are directed by Section 10(e) of the Federal Power Act to fix reasonable annual charges for the purpose of recompensing the United States for the use, occupancy and enjoyment of the tribal lands involved herein. While those lands obviously have different market values from one another, they are used for the single purpose of conveying water from the San Luis Rey River watershed to the Escondido Creek watershed.¹⁹⁸ Aside from questions pertaining to the level of annual charges, the application of fair market value principles requires the assignment of different unit values to the lands along that conduit on the basis of their physical locations and characteristics. If we are to fix compensation for the use, occupancy and enjoyment of the lands, it would appear to be more appropriate to assign values on the basis of their relative importance to the purpose

¹⁹⁸There are two exceptions. Some of the lands within the Rincon Indian Reservation are used to generate electric power, for which separate power benefits will be fixed. And some of the lands within the La Jolla Indian Reservation are used for the diversion facilities (including a caretaker's cottage), which are claimed to have special value because they mark the point from which water flows by gravity alone to the Escondido Creek watershed. If such lands have special value, as claimed, the appropriate way to measure and allocate that value within the scheme of Article 30 is to assume that the diversion facilities are moved upstream just beyond the eastern border of the reservation, and that a pipe capable of conveying 70 cfs of water is laid in the bed of the San Luis Rey River to the existing conduit so that water could continue to flow (from a point off the reservation) by gravity alone to the Escondido Creek watershed. The La Jolla Indian Reservation would thereby receive a larger share of the annual charges resulting from the extension of the conduit within its boundaries, but at the expense of the Rincon and San Pasqual Indian Reservations whose shares would thereby be diluted. On the other hand, the La Jolla Indian Reservation would thereby lose its Henshaw-controlled fishery benefits within the same reach of the San Luis Rey River and, as a result, we find that those fishery benefits are a reasonable exchange for any special water conveyance value which might be attributable to the lands occupied by the diversion facilities.

for which they are used which, in this instance, is the conveyance of water.

We find, in this connection, that *every foot of the Escondido Canal is as important to its water conveyance value as every other foot*. And we can conceive of no rational basis for allocating its water conveyance value among the beneficial owners of the lands occupied by the Escondido Canal other than on a linear foot or acreage-occupied-by-the-right-of-way basis. We prefer the former because the right-of-way is not uniform through-out and because it facilitates the inclusion of the Lake Wohlford project area.

— (*Benefits Claimed by the Three Bands*)

The Bands and Interior contend that the La Jolla, Rincon and San Pasqual Bands are entitled to receive annual charges only for the benefits which are attributable directly to the tribal lands of those Bands which are occupied by Project No. 176. Specifically, they claim 100% of the water conveyance benefits and 100% of the Rincon power benefits which they say comprise less than one-third of the dollar value of the project's total benefits. Conversely, they do not claim Bear Valley power benefits, Lakes Henshaw and Wohlford recreation and storage benefits, flood control benefits and Warner Ranch agricultural benefits, none of which are attributable directly to tribal lands.¹⁹⁹

Except for the percentage of the benefits claimed by the Bands and Interior, which is considered next, we find that their approach is reasonable and that there is no need to

¹⁹⁹Although they contend that water quality differential benefits are attributable directly to tribal lands, they do not seek annual charges for them because it is believed that they will diminish or disappear with the introduction of high quality northern California water into one or both of the San Diego Aqueducts. Furthermore, they concede that the differential is offset to some extent by the uncertainty of the San Luis Rey water supply.

give further consideration to project benefits not directly attributable to tribal lands. In the circumstances of this proceeding we reject the approach of the two staff witnesses who would evaluate all of the project benefits, including those not directly attributable to tribal lands.

— (*Fifty/Fifty Division Applies to Relicense Periods*)

The benefits which are derived from a water power project are attributable partly to the land on which the project works are situated and partly to the improvements comprising the project works. In allocating the relative contributions of the land and improvements to those benefits for the purpose of fixing annual charges, it is equitable to assign 50% of the benefits to the land and the other 50% to the improvements because there is no rational basis for any other division.²⁰⁰

Conversely, allocations ordinarily are not based on the relative amounts invested in the land and improvements. Investments might not have been made in the land, as in this case; or investments might have been made in the land and improvements at times when dollar values were materially different, as in the case of additions to existing projects. And allocations heretofore have not taken into consideration whether a particular initial licensing pertained to an unconstructed project or a constructed project.

The Bands and Interior contend on exception that a 100/0 allocation should be made in favor of the land (and consequently the La Jolla, Rincon and San Pasqual Bands), rather than a 50/50 allocation, when previously licensed

²⁰⁰In fixing annual charges we are concerned with allocating the benefits of a water power project between two kinds of capital, land and improvements. We are not concerned with allocations among the economic elements of capital, labor and management.

facilities are relicensed.²⁰¹ They argue:

"The original licensee has no more equitable, moral or economic interest in the project works at the end of the license period than anyone else. It has a right only to its net investment. Licensees were to earn their return and reap their harvest during the first 50 years. If they are not entitled to a preference in a Section 15 relicensing, then neither are they entitled to any special consideration in fixing annual charges."

As discussed under FEDERAL TAKEOVER NOT RECOMMENDED, the net investment concept merely provides a formula under which an acquisition price to the government or new licensees can be determined. The "sharing of the net benefits" concept, on the other hand, provides a formula under which a reasonable rental for the use, occupancy and enjoyment of tribal lands can be determined. If allocations of net benefits in initial licenses are not based on (1) the relative amounts invested in land and improvements, or (2) whether an initial license pertains to a constructed or unconstructed project, there is no reason to allocate net benefits in relicenses on the basis of whether existing improvements are acquired by new licensees at no cost (zero net investment) or a substantial cost (condemnation), or on the basis of whether new licensees make additional improvements, or the relative value of those improvements.

The owners of the land and improvements utilized in a water power project are entitled to share the net benefits of that project for however long the land and improvements

²⁰¹They state, "When there is no investment required or contemplated for the new license period, there is no reason to make that initial 50-50 apportionment." Since the power license issued herein contemplates new investment in connection with rerouting of the Escondido Canal and the Henshaw facilities, the issue is moot.

continue to produce those benefits, whatever the relative cost of the improvements to the new licensees and notwithstanding that improvements are depreciable while land is not, and whether they are carried on the books of account at a substantial or nominal value. The compensation for the use, occupancy and enjoyment of the tribal lands is being fixed for the new license term; the licensees under the new license are as much the owners of the improvements as was the licensee under the old license; and the new licensees are entitled to the same share of the net benefits as the former licensee. Accordingly, we find no basis for departing from a 50/50 allocation of net benefits by reason of the fact that the power license issued herein includes previously licensed facilities.

— (*Formula Annual Charge Approach*)

Section 10(e) provides, in pertinent part, that annual

“charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing. . . .”

In view of the fact that a project ordinarily has been in service more than twenty years when the operation and maintenance of its works are relicensed, we construe the foregoing provision as precluding the Commission from readjusting annual charges for the period ending ten years after the annual charges fixed by the new license go into effect.

Although Section 10(e) also speaks of “an amount to be fixed by the Commission,” we construe those words as permitting the dollar amount of annual charges to change from year to year under the provisions of a formula which is fixed by the Commission and which cannot be readjusted

for the twenty and ten year periods specified therein. The formula approach is supported by the Bands, Interior and the Commission staff, and is opposed, but apparently not strenuously, by Mutual, Escondido and Vista.

We find that the formula approach is particularly useful because certain events will occur during the 10-year non-readjustment period which will affect significantly the net water benefits of Project No. 176 in amounts and at times which cannot accurately be projected. Among those events: Depreciation charges reducing net water benefits will be incurred when the Escondido Canal is relocated in part off the San Pasqual Indian Reservation, and depreciation charges which will be even more significant will be incurred when Henshaw Dam and the pumping facilities on Warner Ranch are modified. Water consumption by Mutual's and Vista's customers is moving from agricultural to domestic, thereby increasing the cost of an alternative supply of water and increasing net water benefits. And the Rincon Band, and possibly the La Jolla and San Pasqual Bands, will be diverting water from the Escondido Canal, thereby reducing net water benefits.

While the parties are at issue with respect to whether the Commission is required to allocate annual charges among the Bands, we interpret Section 17(a) of the Federal Power Act as requiring the Commission to do so:

"All proceeds from any Indian reservation shall be placed to the credit of the Indians of *such* reservation. All *other charges* arising from licenses hereunder . . . shall be paid into the Treasury of the United States. . . ." (Emphasis added.)

The term "other charges" in the second sentence indicates that the first sentence includes annual charges for the use, occupancy and enjoyment of tribal lands, and the term "such" in the first sentence indicates that the Commission

must allocate those charges among the La Jolla, Rincon and San Pasqual Bands.

Since annual charges are being allocated among the beneficial owners of the lands occupied by the Escondido Canal on a linear foot basis, and since the three Bands will be affecting those annual charges by diverting water from that conduit, and since the Bands presumably will not be diverting water equally or ratably, the formula approach provides a vehicle for adjusting the allocation for the relative diversions of water by the three Bands.

Finally, none of the six witnesses testifying with respect to annual charges appears to have considered that the annual charges of one year will become operating expenses of Project No. 176 which will reduce the annual charges of the following year. The formula approach will reflect such rental expenses.

— (*Step 1: Determine the Net Water Benefit*)

The first step under the formula approach of Article 30 is to determine the Net Water Benefit of Project No. 176, which is the annual difference in the cost of obtaining San Luis Rey water through Project No. 176, and the cost of obtaining the same volume of water from the least expensive alternative source which, in this case, is MWD.

The definitions in Article 30 of the terms "Net Canal Water", "Cost of Canal Water", "Cost of Alternative Water; and "Net Water Benefit" delineate the principles but not the details of determining the Net Water Benefit. The details will be determined from year to year by the Director of the Division of Licensed Projects, Office of Electric Power Regulation, or that officer's Deputy. It is expected that questions requiring resolution will arise in connection with the initial determination and possibly in connection with subsequent determinations when new fac-

tors possibly affecting the Net Water Benefit arise. It is intended that the initial determination will serve as a guide to subsequent determinations.

As a guide, we would note that it should make no difference whether general and administrative expenses are included in, or excluded from, the computations; costs which would be incurred whether the water is obtained from the San Luis Rey River or MWD will result in a zero differential and, consequently, will not affect the amount of the Net Water Benefit. On the other hand, computed costs associated with MWD water facilities which would be required to replace existing facilities which bring San Luis Rey water to the Escondido and Vista service areas, including storage facilities, should be allowed. But any computed costs which would represent improvements to existing facilities, as distinguished from replacements of those facilities, or which would be associated with water quality differentials, should not be allowed.

Since MWD charges different rates for domestic and agricultural water, the Cost of Alternative Water to Mutual/Escondido would be derived by applying the domestic/agricultural distribution percentages for the Escondido service area for a given year to MWD's domestic/agricultural rates for that year, to derive a weighted average cost of water, and to apply that cost to Mutual's share of Net Canal Water for the same year. Similarly, the Cost of Alternative Water to Vista would be derived by applying the domestic/agricultural distribution percentages for the Vista service area for the same year to MWD's domestic/agricultural rates, and to apply that cost to Vista's share of Net Canal Water for that year. The sum of Mutual/Escondido's and Vista's Cost of Alternative Water represents the direct cost of alternative MWD water to them.

The sum of Mutual/Escondido's and Vista's Cost of Alternative water should be adjusted for computed costs associated with facilities which would be required for a hypothetical changeover from partial to full MWD water service — substitutions without improvements, including an assumed comparability of water quality — to derive the cost of obtaining MWD water. Finally, the Cost of Canal Water would be deducted to derive the Net Water Benefit of Project No. 176 for the year.

— (*Step 2: Allocate the Net Water Benefit to Tribal Lands*)²⁰²

The second step under the formula approach of Article 30 is to allocate a portion of the Net Water Benefit to the lands of the United States and the tribal lands of the La Jolla, Rincon and San Pasqual Bands which are used and occupied by Project No. 176. It is also the most controversial step of the several proposed formulas, principally because the sponsoring witnesses have failed for the most part in their functionalizations of Project No. 176 in the manner approved in *Montana III*, *supra*, in their derivations of natural measurements and, consequently, in their allocations of functional benefits to the lands.

As we said earlier, the

“ . . . most significant value [of the San Luis Rey River and Escondido Canal], as all parties agree, comes from their ability to provide good quality and *relatively inexpensive* water for domestic and irrigation consumption in an essentially dry but fertile geographic area. Their water supply value, particularly as it relates to Henshaw-stored water for consumption during the dry summer period, dominates all other values in choosing among the competing proposals.” (Emphasis added.)

²⁰² Appendix B illustrates the allocation described herein.

To that we now add that they will continue to be of such value only as long as, and to the extent that, they can continue to convey water from the San Luis Rey watershed to the Escondido and Vista service areas at a lower cost than the cost of obtaining equal volumes of water from MWD through the San Diego Aqueducts. If the cost of San Luis Rey water should exceed the cost of MWD water, the Licensees would likely find that continued operation of Project No. 176 is uneconomic and file an application to surrender their license pursuant to Section 6.

Accordingly, the water supply value of Project No. 176 is attributable principally to the Henshaw development (including Warner Ranch), insofar as that development *gathers* and *stores* water for summer consumption (which is the "water" value), and to the Escondido Canal (including the Wohlford development), insofar as it *conveys* water from the San Luis Rey River basin to the Escondido Creek basin and the ultimate areas of consumption (which is the "supply" value).

It should be observed, in this connection, that the Escondido Canal conveyed the natural flow of the San Luis Rey River for almost thirty years before Henshaw Dam was constructed. The conduit was built even though the Henshaw development wasn't in existence. But Henshaw Dam would not have been constructed, at least without its own conduit, if the Escondido Canal wasn't available for enlargement. Under such circumstances, any water conveyed by the Escondido Canal which is attributable to the natural flow of the San Luis Rey River derives all of its economic value from the conveyance function of Project No. 176. But any water conveyed by that conduit which is attributable to the Henshaw development derives part of its economic value from the gathering/storage function of that development and part from the conveyance function of the Escondido Canal.

Since we can find no rational basis for allocating the economic value of Henshaw development water between the gathering/storage function of the Henshaw development and the conveyance function of the Escondido Canal, we will assign 50% of the value to the Henshaw development and the other 50% to the Escondido Canal, per the shaded part of the allocation arrow shown in Appendix B.

To determine the relative amounts of water which are attributable to the natural flow of the San Luis Rey River and to the Henshaw development, we turn to the testimony of a staff witness who made a study of the volumes of water which were diverted into the Escondido Canal from water-year 1897 through water-year 1922, just before Henshaw storage began, and from water-year 1923 through water-year 1970. The witness assumed that all natural flows originating upstream from the Escondido Canal (whether upstream or downstream from Henshaw Dam) up to 70 cfs on a monthly average were diverted into the Escondido Canal, and that all natural flows exceeding that average continued downstream past the Escondido Canal. On the basis of that study, which is not challenged, the witness estimated that without the Henshaw development "at least" 48% of the total natural flow from 1925 through 1970 would have gone past the Escondido Canal, and that with the Henshaw development only 7.4% of the total natural flow during the same period continued past that conduit.

It might be concluded from that testimony that up to 52% of the total natural flow would have entered the Escondido Canal in the absence of the Henshaw development, and that the latter contributed more than 40% (48% or more, less 7.4%) of the natural flow, or about 44% of the total water which entered that conduit. But the witness also testified,

"Whenever the total natural flow at the diversion was less than 70 c.f.s., I assumed all was diverted. When-

ever the total natural flow was greater than 70 c.f.s., I assumed that the monthly average excess spilled over the diversion. This is admittedly an approximation, since high flows do not happen as average monthly flows, but as irregular hydrographs. However, in the absence of daily or instantaneous discharge data, this is the best estimate I could make with the data available."

In view of that testimony, we conclude that the Henshaw development probably contributes more than 44% but not more than 50% of the total volume of water which enters the Escondido Canal. And for the purpose of allocating the Net Water Benefit of Project No. 176, we conclude that one-half of the water which flows through the Escondido Canal is attributable to the Henshaw development, and that the other one-half is attributable to the natural flow of the San Luis Rey River.²⁰³

Since Mutual owns substantially all of the improvements comprising the Escondido Canal but not the land on which it is situated, one-half of the Net Water Benefit which is attributable to the conveyance function of that waterway should be allocated to the Licensees, and the other one-half should be allocated among the beneficial owners of the land which is used and occupied by that conduit. The Net Water Benefit attributable to the conveyance function should be measured by the sum of (a) all of the natural flow water, which is 50% of the water flowing through the conduit, and (b) one-half of the Henshaw development water, which is an additional 25% of the water flowing through the conduit. In other words, the Net Water Benefit attributable to the Escondido Canal should be measured by 75% of the water

²⁰³The Henshaw development contributes one-half of the water which ultimately enters the computation of the Net Water Benefit.

passing through that conduit; and one-half thereof, or 37.5% should be allocated among the beneficial owners of the land on which it is situated.²⁰⁴

Since the Escondido Canal derives its economic value from the conveyance or transportation function which it performs, we are choosing a linear unit of measurement to allocate that value according to the distance traversed by that conduit, ratably among the owners of the land used and occupied by it. A linear unit is premised upon all of those lands contributing to that value ratably according to distance. It is superior to an area unit because it eliminates distortions resulting from the fact that the right-of-way is not uniform throughout, and resulting from the pack trails and access roads which contribute indirectly, but not directly, to the conveyance function.²⁰⁵

From Station 1 on the diversion dam, through Station 302A on the common boundary of the San Pasqual Indian Reservation and the Lake Wohlford project area, the Escondido Canal traverses lands which are classified as follows:²⁰⁶

²⁰⁴The other 62.5% should be allocated to the Licensees, consisting of the sum of (a) the other 37.5% of the Net Water Benefit which is attributable to the conveyance function and, therefore, should be allocated to the Licensees as the owners of the improvements, and (b) the other 25% of the Net Water Benefit which is attributable to the water flowing through the Escondido Canal, which is the other one-half of the Henshaw development water and should be allocated to the Licensees because Vista owns the improvements and substantially all of the land comprising the Henshaw development.

²⁰⁵As is discussed below, a linear unit also provides a vehicle for precluding a distortion by the Lake Wohlford project area.

²⁰⁶The figures are derived from the 1975 Exhibit K maps and differ somewhat from those contained in Exhibit B-94 which were derived from earlier Exhibit K maps. Because the distances from Station 279A (assumed with Station 281A to be on a boundary of the San Pasqual Indian Reservation) to Stations 279 and 280 are not shown on Exhibit K-8 (January 1975), the distance from Station 279 to Station 280 has been apportioned so that the length of the Escondido Canal through the San Pasqual Indian Reservation is consistent with Exhibit B-94.

	Linear Feet	Per Cent Linear Feet
La Jolla Indian Reservation	6,323	8.80
Rincon Indian Reservation	4,134	5.75
San Pasqual Indian Reservation	9,887	13.75
Total Indian Reservations	20,344	28.30
Private	10,593	14.74
U.S. Government (Non-Indian)	40,950	56.96
Total	71,887	100.00

If the United States is compensated pursuant to the formula in 18 CFR § 11.21(b) for the use, occupancy and enjoyment of its lands other than the tribal lands of the La Jolla, Rincon and San Pasqual Indian Reservations, such compensation currently would be considerably less than the allocative share of the Net Water Benefit attributable to those lands. Compensation pursuant to that formula would, therefore, violate the principle embodied within Article 30 that every foot of the Escondido Canal is as important to its water conveyance value as every other foot. And the difference between the compensation under that formula and the allocative share of Net Water Benefits would inure to the benefit of the Licensees, increasing the share allocated to them as owners of the improvements to more than 50%. Accordingly, compensation pursuant to that formula would also violate another principle embodied within Article 30 that 50% of the Net Water Benefit is to be allocated to the owners of the improvements, as such, and the other 50% is to be allocated to the owners of the land, as such.²⁰⁷

If, on the other hand, the non-tribal lands of the United States are excluded from sharing the Net Water Benefit

²⁰⁷More than 50% of the Net Water Benefit will inure to the benefit of the Licensees because they own some of the land as well as all of the improvements.

attributable to them, and the compensation pursuant to the formula in 18 CFR § 11.21(b) is deducted from that allocative share, so that the difference between that allocative share and that compensation is in turn allocated among the remaining lands occupied by the Escondido Canal, the result would also violate the principle that every foot of that conduit is as important to its water conveyance value as every other foot.²⁰⁸

Section 10(e) of the Federal Power Act condemns “excessive profits” in fixing annual charges and, therefore, to preclude such a result consistent with the other principles which are embodied within Article 30, we find that the special conditions of this case warrant an adjustment from the formula in 18 CFR § 11.21(b). We find that the Net Water Benefit of Project No. 176 should be allocated to the non-tribal lands of the United States according to the distance traversed by the Escondido Canal through those lands.

While Henshaw development gathers and stores water, and the Escondido Canal conveys water from one basin to another, the Wohlford development conveys and stores water within the basin of the Escondido Creek. For almost thirty years, of course, Wohlford-stored water represented the only significant summer supply in the Mutual/Escondido service area. But with the construction of Henshaw Dam and, later, with the availability of MWD water, the storage function of the Wohlford development became less critical to a reliable water supply. In fact, we do not perceive how its storage function adds to the Net Water Benefit of Project No. 176, at least in any way not subsumed by the Henshaw development. The Wohlford development generally stores only Mutual's water, and it does so only after that water

²⁰⁸While the result would benefit the three Bands principally, it would also benefit the Licensees as landowners.

has passed through the Escondido Canal. Certainly, in view of its geographic location, the Wohlford development cannot make more water available to the computation of the Net Water Benefit, and does not appear to warrant a separate percentage allocation as in the case of the Henshaw development.

On the other hand, the Wohlford development continues to perform a conveyance function which begins at Station 302A of the Escondido Canal and ends at Station 19 of the outlet pipe and penstock traverse at or near the Bear Valley power house, near the northeastern part of the Escondido service area. Arguably, that transportation function is less important than that of the Escondido Canal because it represents an in-basin conveyance rather than a trans-basin conveyance. However, if the two types of conveyances contribute differently to the Net Water Benefit of Project No. 176, the difference appears to be incapable of quantification, as does the contribution of the Wohlford development storage function to the Net Water Benefit.

The Escondido Canal and the Lake Wohlford project area are the principal components of the complete unit of development as it was originally constructed, and as licensed in 1924 as Project No. 176; and that unit of development derives its economic value principally from the conveyance function, but also from the storage function, which are performed by those components. Since we are unable to find any rational basis for allocating the relative contributions of such conveyance and storage functions to the Net Water Benefit of Project No. 176, we choose to treat them as a single conveyance/storage function for the purpose of allocating the Net Water Benefit.

Since Mutual owns substantially all (and Mutual and Vista together apparently own all) of the improvements comprising the unit of development consisting of the Escondido

Canal and the Lake Wohlford project area, 50% of the economic value attributable to the conveyance/storage function of that unit should be allocated to the Licensees. The other 50% of that value should be allocated to the owners of the lands used and occupied by those improvements. And since the conveyance function dominates the economic value of that unit of development, particularly as it relates to the trans-basin conveyance by gravity through the Escondido Canal, we are choosing the same linear unit of measurement to allocate that economic value according to the distance traversed by the Escondido Canal and the Wohlford development as a single unit, ratably among the owners of the land used and occupied by that unit.²⁰⁹

Although the 1975 Exhibit K maps do not contain sufficient information to determine the exact length of a traverse of the Lake Wohlford project area, and we are unable to find such information elsewhere in the record, that distance is partly computed and partly estimated from Exhibit K-10 (April 1975) as approximately 10,250 feet.²¹⁰ Of the 843 acres comprising the Lake Wohlford project area, 662 acres, or 78.53%, are owned by Mutual; and, consequently, 78.53% of the traverse, or 8,049 feet, will be classified as occupying "private" lands for the purpose of allocating the Net Water Benefit. Similarly, the remaining 181 acres or 21.47%, are

²⁰⁹Considering that the right-of-way of Project No. 176 at present cover 311.08 acres, and that the Lake Wohlford project area traverses about 1/7 the length of the Escondido Canal and occupies 843 acres, a linear unit of development provides a vehicle for precluding the numerically larger number of acres of Lake Wohlford storage lands from distorting the allocation of economic value.

²¹⁰While the approximation of 10,250 feet is used for the purpose of illustration and discussion in this Opinion and order, the actual linear distance should be used in computing the annual charges. The Licensees should file new Exhibit K maps which should include all traverse distances which are necessary for the computation of annual charges pursuant to the power licenses issued herein.

owned by the United States; and, consequently, 21.47% of the traverse, or 2,201 feet, will be classified as occupying lands of the United States. The traverses of the Escondido Canal and the Lake Wohlford project area are then combined into the following table:

	Linear Feet	Per Cent Linear Feet	Per Cent Indian
La Jolla Indian Reservation	6,323	7.70	31.08
Rincon Indian Reservation	4,134	5.03	20.32
San Pasqual Indian Reservation	9,887	12.04	48.60
Total Indian Reservations	20,344	24.77	100.00
Private	18,642	22.70	—
U.S. Government (Non-Indian)	43,151	52.53	—
Total	82,137	100.00	100.00

On the basis of the foregoing approximation, but subject to correct traverse distances and the future modification of the traverse of the Escondido Canal through the San Pasqual Indian Reservation, the United States would be entitled to 52.53% of the 37.5% of the Net Water Benefit of Project No. 176 which is allocated to the owners of the land occupied by the Escondido Canal and the Lake Wohlford project area, or an annual charge of approximately 19.70% of the Net Water Benefit each year applicable to its non-tribal lands. Similarly, the La Jolla, Rincon and San Pasqual Bands as a group would be entitled to 24.77% of the 37.5%, or an annual charge of approximately 9.29% of the Net Water Benefit each year. The further allocation of the annual charges among the three Bands is discussed next, and the reasonableness of the results is discussed under COMPLIANCE ISSUES — Reasonableness of Annual Charges.

—(Step 3: Allocate the Annual Charge Among the Three Bands)

The third step under the formula approach of Article 30 is to allocate the annual charge among the La Jolla, Rincon and San Pasqual Bands. Since the annual charge is an amount fixed as a rental for the use, occupation and enjoyment of the tribal lands, and since those lands are being treated as being equal in value for the purpose of fixing that rental, the annual charge should be allocated ratably among the tribal lands according to the distance traversed by the Escondido Canal through them. But since diversions of water from the Escondido Canal by the three Bands will reduce the Net Water Benefit of Project No. 176 and, consequently, the annual charge which otherwise would be paid, and since it is assumed that the three Bands will divert different volumes of water from one another and from year to year, the allocation of the annual charge among the three Bands should be adjusted for the relative diversions of water by them.

The foregoing objectives are accomplished by recomputing the amount of the annual charge on the assumption that the three Bands diverted no water during the year. In other words, the diverted volumes are added to the measured volumes which leave the Escondido Canal to determine the Gross Canal Water for the year, and that amount is utilized to derive a new and higher Cost of Alternative Water for computing a Gross Water Benefit for the year. On the basis of the same approximation and subject to the same conditions as in the preceding discussion, 9.29% of the Gross Water Benefit should be placed to the *tentative* credit of the La Jolla, Rincon and San Pasqual Bands as a group, representing the computed amount of the annual charge on the assumption that the three Bands diverted no water during the year. Of that computed annual charge, 31.08% should then be placed to the *tentative* credit of the La Jolla Band,

20.32% to the Rincon Band and 48.60% to the San Pasqual Band, according to the relative distances traversed by the Escondido Canal through their respective tribal lands.

The amount of the annual charge as originally computed should be deducted from the amount as recomputed on the assumption that the three Bands diverted no water during the year, to determine the amount by which the annual charge is reduced by the diversions of the three Bands during the year. That difference should then be allocated among the three Bands according to the measured volumes of water diverted from the Escondido Canal to their respective tribal lands pursuant to Article 29 during the year, and the amounts which are so allocated should be deducted from the amounts which were placed to the tentative credit of the respective Bands. Finally, the remaining amounts are those which should be placed to the credit of the La Jolla, Rincon and San Pasqual Bands, respectively, as required by Section 17(a) of the Federal Power Act.

—(Step 4: Determine and Allocate the Net Rincon Power Benefit)

If Mutual/Escondido²¹¹ and Vista were to lose their San Luis Rey water, they would have to obtain another supply since they are in the business of distributing water for consumption. It is appropriate, therefore, to measure the water benefits of Project No. 176 by the annual difference in the cost of obtaining San Luis Rey water through the project and the cost of obtaining the same volume of water from the least expensive alternative source. Conversely, their revenues from the sale of that volume of water are not an

²¹¹ Although Mutual sold the remaining part of its water distribution system to Escondido in conjunction with the 1970-71 tender offer and Operating Agreement, the court-approved arrangements are such that they are being treated as a single entity for the purpose of this discussion.

appropriate benchmark because they reflect additional costs associated with distribution services, such as filtration and chlorination.

Mutual's electric power distribution business, on the other hand, was sold to SDG&E in 1954 under arrangements whereby (1) Mutual continues to generate electric power at its two power plants and sells their output in excess of its own requirements to SDG&E, except insofar as Mutual is obligated under the agreement of February 2, 1914, to have power "constantly available whenever required for pumping water" by the Rincon Band, and (2) SDG&E sells electric power to Mutual for Mutual's and the Rincon Band's consumption whenever Mutual isn't generating power, or Mutual's generation is insufficient for its and the Rincon Band's requirements. As a result, Mutual would not have to obtain another supply if it were to stop generating electric power at its Rincon power house except for its own consumption and that of the Rincon Band. As a further result, and because Mutual performs no distribution services in conjunction with its direct sales to SDG&E and the Rincon Band, its revenues from such sales are an appropriate benchmark for measuring the power benefits of Project No. 176 to Mutual.

In other words, since Mutual is not in the business of distributing electric power, it is appropriate to measure the power benefits of Project No. 176 by the annual difference in the cost of generating Rincon power and the revenue derived from that power, subject to adjustment for Mutual's purchasing electric power and reselling it directly to the Rincon Band. And that is the difference between the so-called "net benefits" approach, which is applied herein to the water benefits of Project No. 176, and the closely related "profitability" approach, which is applied herein to the Rincon power benefits.

Under the formula approach of Article 30, the Net Rincon Power Benefit of Project No. 176 is the annual difference in the cost of generating electric power at the Rincon power plant and the revenues received from the sale of that power, plus or minus the gains and losses associated with the purchase of power from SDG&E and its resale to the Rincon Band.

Revenues and expenses associated with the sale and purchase of electric power should be allocated on the basis of the sum of all demand, energy and other charges associated with the number of kilowatt-hours involved. The number of kilowatt-hours purchased from SDG&E and resold to the Rincon Band should be included in the calculations to reflect the gains and losses associated therewith. The costs associated with the power consumed by Mutual in the operation and maintenance of its Rincon power plant should be reflected in the operation and maintenance expenses, whether the power which is so consumed is generated by the Rincon power plant or purchased from SDG&E.²¹² But the difference between the \$.00125 received for the sale of Rincon-generated power to the Rincon Band and the higher revenues which would have been received from the sale of that power to SDG&E, should be excluded from the computation.²¹³

As in the case of the water benefits, 50% of the Rincon power benefits will be allocated to the Licensees since Mu-

²¹²The costs associated with the power which is neither consumed in the operation and maintenance of the Rincon power plant, nor sold or resold to the Rincon Band, should be reflected elsewhere, such as in the operation and maintenance of the water supply facilities of Project No. 176.

²¹³The Rincon Band receives the benefit of the inexpensive power and should not receive a second benefit in the form of an upward adjustment of the revenues on which its annual charges are based. If the power supply arrangements between Mutual and the Rincon Band should be changed, as, for example, if the agreement of February 2, 1914, should be declared invalid, the formula approach of Article 30 will reflect the new arrangements.

tual owns the Rincon penstock and power house. And the remaining 50% will be allocated to the Rincon Band since it is the beneficial owner of all non-government lands used and occupied by those improvements.²¹⁴ Accordingly, the Rincon Band would be entitled to 50% of the Net Rincon Power Benefit of Project No. 176, which amount should be credited pursuant to Section 17(a) to that Band as an annual charge.

The substance of the presiding judge's proposed Article 37 is included in Article 30 in modified form to impose annual charges for the rights-of-way occupied by certain transmission lines for telephone and other services (the "wire lines") which are utilized by Project No. 176.²¹⁵ As the presiding judge indicated, the wire lines are principally in mountainous terrain where they follow convenient courses which result in technical trespasses without damage in fact. The annual charges are imposed only with respect to the rights-of-way occupied by those portions of the wire-lines which are situated within the La Jolla, Rincon and San Pasqual Indian Reservations and are outside of project boundaries. To the extent that the wire-lines are utilized only for project purposes, the annual charges would be the

²¹⁴Government lands other than tribal lands will be disregarded in this instance because they represent approximately 6% of the lands occupied by the Rincon penstock and power house, and because the Net Rincon Power Benefit is minor in comparison to the Project No. 176 Net Water Benefit.

²¹⁵The presiding judge would have fixed the amount at \$100 per mile. Although no objections have been raised as to that amount, it is not synchronous with the amount prescribed by the Commission's Regulations Under the Federal Power Act for the use of Government lands for transmission line rights-of-way only, which amount is approximately \$12.50 per mile for 1979 for the 20-foot wide rights-of-way occupied by the wire-lines in question. See TERMS OF THE TRANSMISSION LINE LICENSE. Since the servitude of those wire-lines is reasonably comparable to that of the Project No. 559 12 kV transmission line, the Commission's regulation applicable to transmission line rights-of-way only will be applied to the tribal lands in question.

same as those payable to the United States pursuant to the Commission's regulations for recompensing the United States for the use, occupancy and enjoyment of lands (for transmission line rights-of-way only) other than tribal lands embraced within Indian reservations. But the annual charges would be one-half of those computed in accordance with the Commission's regulations to the extent that the wirelines are utilized by both Mutual, Escondido or Vista, and the La Jolla, Rincon or San Pasqual Bands. And the annual charges should be credited to the respective Bands in proportion to the acreage occupied within their respective tribal lands by the wireline rights-of-way for which they are imposed.

Sharing the Cost of Canal Water (Article 31)

So long as diversions of water to the Indian Service Area approximate the historic diversions to the Rincon Indian Reservation, there will be little or no economic impact upon the Project No. 176 ratepayers since they will be subsidizing essentially the same proportionate amounts of water as in the past.²¹⁶ But the La Jolla, Rincon and San Pasqual Bands

²¹⁶The agreement of June 4, 1894, speaks of furnishing an ample supply and quantity of water to the La Jolla and Rincon Bands at the expense of Mutual's predecessor, and provides, further,

"That the right to the free use of a sufficient quantity of water from the flume or canal of said company as hereinbefore stipulated shall continue and be in force so long as the Indians shall reside upon the said reservations. . . ."

As we understand that agreement, the La Jolla and Rincon Bands would not be charged for their water, and the costs applicable to the water used by them would be "absorbed" by Mutual's predecessor and subsidized by its ratepayers.

Insofar as concerns the Rincon Band, that agreement was superseded by the Agreement of February 2, 1914, which quantified that Band's entitlement at six cubic feet per second, measured at or near the intake of the Escondido Canal, and then provided that Mutual would sell electric power to the Rincon Band at specified rates for the purpose of pumping water

" . . . so that when the pumped water is added to the water which passes through the power plant, said Indians will have all the water needed for their use, not to exceed six cubic feet per second. . . ."

say that they have a plan to increase significantly their agricultural acreage and, consequently, their consumption of water. And to the extent they are successful, they will reduce the volumes of water which are available to the Project No. 176 ratepayers and cause the operating costs to be recovered over increasingly smaller volumes of water. The result will be to drive up the cost of San Luis Rey water, possibly to the point of causing abandonment of Project No. 176.

Article 31 of the power license issued herein provides a more equitable approach by requiring the La Jolla, Rincon and San Pasqual Bands to share the operating costs of Project No. 176 with Mutual, Escondido and Vista if they are going to divert water from the Escondido Canal. Three witnesses estimate that from 8.77% to 9.53% of the water which flowed through the Escondido Canal from the mid-1920's to 1970 was diverted to the Rincon Indian Reservation. Since it is generally agreed that the Rincon Band was short-changed during the period covered by those estimates, and particularly since the inflows from *all* of the tributaries of the San Luis Rey River into Lake Henshaw were never measured, Article 31 provides that there will be no sharing of operating costs for any year in which diversions of water to the Indian Service Area are less than 12% of the volume

Since the United States pays for such power, the costs applicable to pumping the water used by the Rincon Band are subsidized by the nation's taxpayers.

Although "free" water might be furnished to the Indian Service Area pursuant to Article 29, the water cannot be free in the larger economic sense since the costs of operating Project No. 176 ultimately must be borne by the ratepayers who consume the water. Under the power license issued herein, diversions of water to the Indian Service Area will reduce the Net Water Benefit of Project No. 176 and, consequently, the annual charges which are based upon the Net Water Benefit. Certainly, under such circumstances, the water diverted to the Indian Service Area is not entirely free.

of water flowing through the Escondido Canal. In other words, Article 31 retains the concept of "free" water for the three Bands and subsidization by the Project No. 176 ratepayers whenever the amount of water diverted from the Escondido Canal does not exceed approximate historic levels.²¹⁷

For any year in which diversions of water are at least 12% but less than 13% of the volume of water flowing through the Escondido Canal, the three Bands as a group would reimburse Mutual, Escondido and Vista 1.5% of that part of the Cost of Canal Water, as that amount is ultimately approved pursuant to Article 30, which is applicable to the facilities situated upstream from the metering or measuring device to be installed at or near the terminal structure. The percentage of reimbursement would then increase by 1.5% for each 1% increase of aggregate diverted volumes on the hypothesis that larger diversions signify a greater ability to share operating costs. For any year in which the diverted volumes equal or exceed 33% of the water flowing through the canal, the three Bands would reimburse Mutual, Escondido and Vista that same percentage of the applicable part of the Cost of Canal Water.

Since the Commission does not have jurisdiction over the La Jolla, Rincon and San Pasqual Bands, as such, Article 31 provides that the obligation of Mutual, Escondido and Vista under Article 29 to permit diversions of water to the Indian Service Area shall be suspended during any period

²¹⁷While Article 31 retains that concept to the extent indicated as between the Bands and Licensees, the fact that annual charges are allocated among the three Bands, in part, in accordance with the relative diversions of water by them, results in an exchange among the three Bands of water for cash annual charges. Such an exchange would be particularly apparent if the Rincon Band becomes a net obligor as discussed in Footnote 218.

of time in which the amount due from a particular Band under Article 31 remains unpaid.²¹⁸ Article 31 provides for the suspension of the obligation but does not require the suspension of service; it permits arrangements for the payment of delinquencies. On the other hand, Article 31 does not permit the suspension of service to one reservation because of the delinquency of the Band of another reservation.

Contractual Obligations to Indians (Article 34)

Article 34 embodies the substance of Interior's Condition 9²¹⁹ in general terms, and requires Mutual, Escondido and Vista to use their best efforts to fulfill their valid contractual obligations to supply electric power and water to the Bands, subject to the terms and conditions of the power license issued herein and the applicable contractual agreements. Among other obligations, and until determined otherwise in the pending litigation involving the water rights incident to Project No. 176 and the final disposition thereof, or in other litigation, Article 34 requires Vista to drill wells and

²¹⁸The distance traversed by the Escondido Canal through the Rincon Indian Reservation is 20.32% of the distance traversed through the three reservations. Since 20.32% of the annual charge attributable to water benefits would therefore be placed tentatively to the credit of the Rincon Band, to be reduced in proportion to that Band's share of the water diverted to its reservation, and since the Rincon Band is expected to become the dominant consumer of Escondido Canal water among the three Bands, it could conceivably become an obligor in allocating that annual charge among the Bands. Accordingly, Article 31 also applies to amounts due under Article 30 which remain unpaid.

²¹⁹"That the Vista Irrigation District agrees to fulfill its obligations to the Pala Indian Reservation pursuant to section 6 of the June 28, 1922 contract between the United States and William G. Henshaw by drilling a well or wells upstream of the Pauma Narrows so that a flow of 6 cubic feet per second from said well or wells is delivered to the Pala Reservation. Provided, however, that if the Vista Irrigation District chooses to supply water to the Pala Indian Reservation from a source other than the San Luis Rey River, such arrangements may be negotiated between the Vista Irrigation District and the Pala Band of Mission Indians subject to the approval of the Secretary of the Interior."

construct facilities pursuant to the agreement of June 28, 1922, and to operate and maintain those wells and facilities, all at Vista's expense, to furnish the Pala Band "with the quantity of water for irrigation purposes to which they are entitled not exceeding a maximum of six cubic feet per second."

The agreement of June 28, 1922, describes that entitlement as "the first six second feet of water naturally flowing in said [San Luis Rey] river, at the point where it crosses the eastern boundary line of said Pala Indian Reservation. . . ." Since the San Luis Rey River ordinarily is dry or near dry during the summer months when irrigation water is needed, and since orchard crops in particular require a water supply which is reliable from year to year, Vista's obligation under the agreement of June 28, 1922, to bring the Henshaw-obstructed flow up to the level of the natural flow, appears to have little practicable value to the Pala Band. As do the others, the Pala Band needs a reliable supply of water; and since that supply must come from the ground in view of the terms and conditions of the power license issued herein, we find that a reliable supply can best be obtained by treating Vista's obligation to drill wells and construct facilities as one to provide the Pala Band with a minimum flow of water.

Furthermore, the natural flow of the San Luis Rey River at the eastern boundary of the Pala Indian Reservation has not been and cannot now be determined because it is obstructed by the Henshaw and diversion dams. Fragmentary historic data,²²⁰ however, suggest that prior to the construc-

²²⁰Official notice is taken of the pertinent portions of U.S. Geological Survey Water Supply Paper No. 300 which describes certain estimates and measurements of the flow of the San Luis Rey River in the vicinity of Pala, California, during the last decade of the 19th century and principally during the first decade of the 20th century.

tion of Henshaw Dam in 1922 there were summer flows in the vicinity of Pala, California, ranging up to three cubic feet per second (and occasionally above). Under such circumstances, we find that a minimum flow of three cubic feet per second is a reasonable requirement. In other words, whenever the flow controlled by the Henshaw Dam and the diversion dam would fall below three cubic feet per second at the eastern boundary of the Pala Indian Reservation, Vista would be obligated under Article 34 of the power license issued herein to pump sufficient groundwater so that the Pala Band would be assured of a continuous supply of three cubic feet per second.

Section 10(i) Waivers

Mutual and Escondido request the Commission to waive, pursuant to its discretionary authority conferred by Section 10(i) of the Federal Power Act, certain terms and conditions which are contained in Part I of that Act and which are routinely waived as to "minor" projects in the absence of special circumstances. All such terms and conditions are being waived, except the following for the reasons indicated:

Mutual requests waiver of Section 4(b), except the second sentence, which requires the submission of information pertaining to the "actual legitimate original cost of and the net investment in" licensed projects. Mutual also requests waiver of Section 14 which provides an acquisition price formula in the event of takeover, except insofar as the power of condemnation is reserved.

Sections 4(b) and 14 will not be applicable to Project No. 176 if the Act of August 15, 1953, is or becomes applicable. That act applies, according to its terms, to "any project owned by a State or municipality". Since the power license herein is being issued to Escondido and Vista, which are municipalities, but also to Mutual, which is not a munici-

pality, we need not decide whether the Act of August 15, 1953, is currently applicable to Project No. 176 as a whole. Our interpretation of the Act of August 15, 1953, under FEDERAL TAKEOVER NOT RECOMMENDED suggests that when there are joint licensees, and one or more of them is a State or municipality and one or more is neither a State nor municipality, the Act of August 15, 1953, is applicable to the interests in project works owned by States and municipalities. In any event, we choose under such circumstances not to waive Sections 4(b) and 14, realizing that the issue will become moot if Mutual's existence is terminated as contemplated.

While Mutual and Escondido also request waiver of Section 15, we think that that provision is so closely connected to Section 14 that it should not be waived in this instance, particularly since annual licenses under Section 15(a) may be required after the expiration of the power license issued herein. And while they request waiver of the notice requirement of Section 4(e), the water supply problem underlying the regrettable length of this Opinion and order suggests strongly that there will be persons who will be interested in receiving notice of the next application for a license for Project No. 176, even though it is a "minor" project.

Lastly, we choose not to waive Section 22, as requested by Mutual and Escondido, because the agreement of February 2, 1914, provides for the sale of power generated by the Rincon power plant to the Rincon Band for an indefinite period of time, which period has extended beyond the termination date of Mutual's 1924 license and will extend beyond the termination date of the power license issued herein. Since the validity of that agreement, among others, is being challenged in the pending litigation involving the

water rights incident to Project No. 176, we are refraining from waiving Section 22 so that we may pass upon that agreement, if necessary, at a later time.

TERMS OF THE TRANSMISSION LINE LICENSE

The principal function of SDG&E's Project No. 559 transmission line is to transmit power from the Rincon powerhouse of Project No. 176 to SDG&E's Rincon Substation on the northern boundary of the Rincon Indian Reservation, at which point it interconnects with SDG&E's distribution system. The secondary function of that 12kV line is to transmit power from SDG&E's Rincon Substation when the Rincon powerhouse is not operating, for the Rincon Band under the agreement of February 2, 1914, as well as Project No. 176. In view of its principal function and the fact that there is no other line to transmit power from the Rincon powerhouse, we find that it is a "primary" transmission line within the purview of Section 3(11) of the Federal Power Act and, consequently, that it should be licensed in connection with the complete unit of development comprising Project No. 176.

Since Project No. 559 serves Project No. 176, the new license is being issued subject to the possible mandatory stay of the effective date of the license for Project No. 176 as provided in Section 14(b) of the Federal Power Act and § 16.10 of the Commission's regulations thereunder. Furthermore, its termination date is being adjusted to coincide with the termination date of the license which is being issued concurrently for Project No. 176. While SDG&E has not asked for waiver of terms and conditions which are contained in Part I of the Federal Power Act pursuant to the Commission's discretionary authority conferred by Section 10(i), the same terms and conditions are being waived with respect to both licenses.

Although the transmission line license issued herein involves the use of tribal lands embraced within the Rincon Indian Reservation, no party is contending that that license will interfere or be inconsistent with the purpose for which that reservation was created. Indeed, the line brings electric power to the Rincon Indian Reservation to satisfy Mutual's obligation under the agreement of February 2, 1914, to have power "constantly available whenever required for pumping water". Furthermore, as discussed under LICENSING ISSUES— First Proviso of Section 4(e)—(Interior's Conditions), Interior's Condition 10 would require SDG&E to permit reasonable agricultural and other use of its licensed right-of-way. Article 16 of the transmission line license issued herein allows the Rincon Band to use, occupy and enjoy any part of that right-of-way to the extent that it is not physically occupied by project works so long as there is no interference or inconsistency with SDG&E's use, occupancy and enjoyment thereof under the license, including obstruction of SDG&E's access to project works.

Considering the secondary function of the Project No. 559 transmission line, and the joint use of the right-of-way occupied by it and suitable safeguards against hazards as provided in Article 6 of the transmission line license issued herein, we find that the license as conditioned will not interfere or be inconsistent with the purpose for which the Rincon Indian Reservation was created. We find, additionally, that the transmission line project is best adapted to a comprehensive plan for improving or developing the San Luis Rey River and Escondido Creek waterways for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes.

SDG&E's 1925 license, as amended in 1928, prescribes an annual charge of \$13, or about \$5 per mile²²¹ for the use, occupancy and enjoyment of the tribal lands embraced within the Rincon Indian Reservation. The presiding judge, on the other hand, would not have fixed an annual charge because Mutual sells Rincon power to SDG&E at SDG&E's commuted cost of producing an equal amount of thermal power, rationalizing that the added rental would impose an "undue burden" on SDG&E's customers. And a staff witness would fix an annual charge of \$928.84 by determining the ratio of Project No. 559 acreage to Project No. 176 acreage, and applying that ratio to the total net benefits of Project No. 176. We reject the presiding judge's approach because Section 10(i) of the Federal Power Act precludes waiver of "annual charges for use of lands within Indian reservations." And we reject the staff witness's approach because annual charges for the use, occupancy and enjoyment of tribal lands by Project No. 176 are not fixed on the basis of the total net benefits of that project, but on the basis of the net water benefits and the net Rincon power benefits.

The 12 kV Project No. 559 transmission line is reasonably comparable in servitude to the communication and other service lines of Project No. 176 for which annual charges are fixed pursuant to the Commission's regulations for recompensing the United States for the use, occupancy and enjoyment of lands other than tribal lands embraced within Indian reservations. Accordingly, and in the absence of acceptable record testimony with respect to a reasonable annual charge therefor, we find that a reasonable annual charge for the Project No. 559 transmission line can be

²²¹On the basis of the Consumer Price Index, which is officially noted, current price levels are about 4 times those in the latter 1920's. Accordingly, the \$5 per mile in 1928 would translate to about \$20 per mile currently.

determined in accordance with the foregoing regulations of the Commission, and Article 17 of the transmission line license issued herein so provides. On the basis of a 40-foot wide²²² and 12,802-foot long right-of-way (11.76 acres) and the maximum interest rate which is applicable to 1979 (6-7/8%), the annual charge for the use, occupancy and enjoyment of the tribal lands of the Rincon Indian Reservation by the Project No. 559 transmission line would be \$60.64 for 1979, or about \$25 per mile.

COMPLIANCE ISSUES

Many of the issues raised by Interior's Complaint filed September 25, 1970, either have been subsumed within the larger relicensing/takeover controversy, or have become moot through the lapse of time or, in one instance, will become moot upon the replacement of approximately 12,000 feet of conduit which allegedly divides the eastern portion of the San Pasqual Indian Reservation. All issues pertaining to the possible revocation of Mutual's 1924 license for Project No. 176 have become moot as a result of the expiration of that license and the issuance herein of a new power license, and all issues pertaining to the disposition of San Luis Rey water will be resolved upon the effectiveness of that license. The remaining compliance issues pertain to compensation for (1) alleged violations of Mutual's 1924 license and/or the Federal Water Power and Federal Power Acts, and (2) the past use, occupancy and enjoyment of the La Jolla, Rincon and San Pasqual Indian Reservations.

No Compensation Back to 1924

The Bands and Interior argue at great length that through the years Mutual and Vista (and Vista's predecessor) committed numerous violations of Mutual's 1924 license for

²²²See 18 CFR § 11.21: 11.76 acres x \$150 per acre x .06875 x .5 = \$60.64. Because the Project No. 176 communication and other service lines occupy 20-foot wide rights-of-way, the effective rate for those lines would be \$12.50 per mile for 1979.

Project No. 176 and/or the Federal Water Power and Federal Power Acts. They contend that the license authorizes the conveyance of Mutual's natural flow water through the Escondido Canal and, conversely, that it does not authorize the conveyance of any Henshaw-impounded water, including pumped water, or the joint use and control of the licensed project works by Vista.

Licenses issued under the Federal Water Power Act and the Federal Power Act ordinarily are expressed in different terms. Typical of such licenses, the principal operative words of Mutual's 1924 license are:

"[T]he Commission hereby issues this license to the Licensee for the purpose of constructing, operating and maintaining upon the lands of the United States hereinafter designated and described, certain project works necessary or convenient for the development, transmission and utilization of power and constituting a part of the project hereinafter described. . . ."

Mutual's 1924 license does not refer to any of the works of the Henshaw development as being among the "project works . . . hereinafter described". Furthermore, it describes the "project covered by and subject to this license" as including water rights described in two exhibits, one of which is dated January 19, 1924, after Henshaw Dam was constructed, but the exhibits do not refer to the Henshaw appropriations of San Luis Rey water.²²³ Accordingly, we

²²³ Although Mutual's application for a license as amended in 1924 mentions the increase in the capacity of the Escondido Canal to 70 cfs and the fact that it would carry water of San Diego County Water Company, it contains nothing to indicate that the historic diversions shown in Mutual's 1921 application (about 3,700 acre-feet annually) would be increased materially or that San Diego County Water Company (and later Vista) would become Mutual's partner-in-fact in Project No. 176. Since a copy of the agreement of November 10, 1922, was not furnished to the Commission until the license was prepared and tendered in 1924, and since the terms of the license were not thereafter altered prior to its acceptance, we find that the license does not contemplate the use of Project No. 176 to convey approximately 8,286 acre-feet of Henshaw-appropriated water annually.

agree with the substance of the Bands' and Interior's contention that Mutual's 1924 license (including subsequent amendments) covers only Mutual's natural flow water.²²⁴

Although O.C. Merrill, Executive Secretary of the Federal Power Commission, said that the agreement of November 10, 1922, "indicates" that Mutual retained sufficient control of Project No. 176 to comply with the then proposed license, he did not indicate whether Vista's predecessor obtained sufficient control to have been required to join Mutual as a licensee. For the reasons indicated under JURISDICTION — Vista Irrigation District, and the fact that the license recites that "Escondido Mutual Water Company" is "the Licensee", the Bands and Interior are correct in the substance of their position that Mutual's 1924 license does not contemplate Vista's operation and control of Project No. 176 jointly with Mutual.

The Bands and Interior contend, additionally, that since the Escondido Canal has been used to convey additional and unauthorized waters and has been under the unauthorized partial control of Vista, and since Mutual and Vista have benefitted from such unauthorized use and control, the La Jolla, Rincon and San Pasqual Bands should be com-

²²⁴The "full understanding of the . . . project" conveyed by the maps, plans and specifications which were filed pursuant to Section 9(a) of the Federal Water Power Act and which were approved as part of the license, was that project No. 176 involved a diversion of the natural flow of the San Luis Rey River, as distinguished from a diversion of a dam-controlled flow. When Henshaw Dam was under construction in 1922 the U.S. Geological Survey advised the Federal Power Commission to defer consideration of Mutual's application for a license pending the filing of another application by Vista's predecessor (Henshaw). The Commission did not do so and, in addition, apparently failed to realize when furnished with a copy of the agreement of November 10, 1922, that the "full understanding of the . . . project" conveyed by the Section 9(a) exhibits was inconsistent with the arrangements within that agreement and, consequently, that Project No. 176 would not be operated as a run-of-the-river project, at least to the Wohlford development.

pensated back to 1924 for such additional and unauthorized use of their tribal lands. They rely, in this connection, on *The Montana Power Company*, 22 FPC 502 (1959), affirmed by *Montana I*, *supra*, wherein the Commission said at page 516,

“[W]hile the Indian Tribes have contributed nothing in addition to what they have already provided and the increase in capacity of Project No. 5 has been due entirely to elements other than those contributed by the Indians, the provisions of the license require that if Unit No. 3 is to be operated, the Indian Tribes are entitled to additional compensation.”

Further, the Bands and Interior call attention to the fact that Section 10(e) of both the Federal Water Power Act and the Federal Power Act mandates that the Commission “shall” fix reasonable annual charges for the use of tribal lands. And they contend that when the Commission fails to carry out that mandate it can and should fix annual charges retroactively to the date of issuance of a license.²²⁵

Although the Bands and Interior characterize the three Bands’ claims for compensation back to 1924 as claims for “annual charges”, we find upon analysis that they are basing their claims on two grounds. They are asking for back annual charges to the extent that their tribal lands were used as contemplated by the license. But they are also asking for damages to the extent that their tribal lands were used in a manner which was different from, or in addition to, the uses

²²⁵They say, “We are *not* claiming that the Commission, having once fixed annual charges, could subsequently and retroactively determine that they were inadequate.”

contemplated by the license.²²⁶

If the three Bands are entitled to compensation for the use of their tribal lands other than as contemplated by Mutual's 1924 license, their remedy is an action in court for damages. Commissioner Morgan said, in this connection, in his concurring opinion in *Idaho Power Company, Project No. 1971*, 22 FPC 572 (1963),

"I wish to make it unequivocally clear that we hereby dismiss the . . . complaint for the specific and technical reason — and only for the specific and technical reason — that this Federal Power Commission has no authority to adjudicate claims for money damages."

Insofar as the three Bands seek past annual charges for the use of their tribal lands as contemplated by the license, as distinguished from damages for the use of their lands other than as so contemplated, we have concluded that the Commission should not fix or readjust annual charges for any period of time prior to the date following the one on which it is asked formally to fix charges for the first time or to readjust charges which previously have been fixed.²²⁷

²²⁶Section 10(c) of the Federal Power Act provides, in pertinent part, "Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefore."

See *Seaboard Air Line Railroad Company v. County of Crisp*, 280 F.2d 873 (CA5, 1960), cert. denied, 364 U.S. 942 (1961), and the explanation of that decision in *Beaunit Corp. v. Alabama Power Company*, 370 F.Supp. 1044 (N.D. Ala., 1973).

²²⁷Although it is true that the Commission readjusted annual charges for Montana Power Company's Project No. 5 as of the first day after the twenty-year period specified by Section 10(e) as precluding readjustments, that day happened to coincide with the day following the one on which the Commission was formally asked for readjustment. *Montana III*, *supra*, 459 F.2d, Footnote 6, at page 866. On the other hand, it is appropriate to readjust as of that date, as distinguished from the later date of a decision on the readjustment, to avoid placing a premium on delay and dilatory tactics. *Montana III*, *supra*, 459 F.2d, at 868. But see Judge Leventhal's concurring/dissenting opinion at 877.

Although the Federal Power Commission found in 1924 that Mutual's "license will not interfere or be inconsistent with the purpose for which any reservation affected thereby was created or acquired," that finding pertained to the operation of Project No. 176 only as contemplated by the license. If Mutual and/or Vista (or Vista's predecessor) had come to the Commission to amend the license, or to obtain another license, the Commission would have had an occasion to consider new conditions and annual charges and, of importance to the three Bands, whether there would be any interference or inconsistency with their reservations. Mutual and/or Vista would have been informed of the cost to them (in terms of annual charges) of the amended "full understanding of the . . . project." But they did not come to the Commission and, as a result, the Commission should not now speculate as to what conditions and annual charges might have been imposed in connection with a license which presumably would have authorized the activities which in fact took place in connection with Project No. 176.

Any attempt in 1979 to fix annual charges in an amount which would have been reasonable in 1924²²⁸ would be fraught with factual and legal difficulties. Assuming, for example, that the Escondido Canal was the most profitable purpose for which the tribal lands occupied by it were suitable, and assuming further that the profit would be measured by the cost of obtaining equivalent volumes of water from the least expensive alternative source, it would appear to be most difficult if not impossible to establish such a cost for the period in which the Escondido Canal was the only major source of water for the Escondido area. Furthermore, it is

²²⁸"The charges were not fixed as of 1967 and made retroactive to 1959. They were fixed in 1967 as the amounts which were reasonable in 1959." *Montana III*, *supra*, 459 F.2d, at 869.

implicit in any decision to readjust annual charges that the original charges had become unreasonable. *Montana III*, *supra*, 459 F.2d, at 867. If the Commission were to fix annual charges as of 1924, would it be appropriate to leave them in effect through the termination date of the license, even though they would become unreasonable prior to that date? Or should they be readjusted as of one or more interim dates and, if so, when?

Although we recognize that courts would encounter the same factual and legal difficulties, nonetheless, we believe that they would provide better forums to redress intertwined claims for past²²⁹ annual charges for the use, occupancy and enjoyment of tribal lands embraced within Indian reservations, and for damages for the use of those lands other than as contemplated by the licenses in question.

Annual Charges to Begin as of 1969

Although Interior asked in its Complaint filed September 25, 1970, for a "readjustment of the charges for the entire period of use," that was not the first time the Commission was asked formally to fix or readjust annual charges for the La Jolla, Rincon and San Pasqual Indian Reservations. The La Jolla and Rincon Bands petitioned the Commission on September 22, 1969, to be allowed to intervene in Mutual's and Escondido's license transfer proceeding, and asked the Commission, among other matters, "for an order requiring readjustment of annual charges." And the San Pasqual Band filed a similar petition on May 25 1970, asking, among other matters, "[f]or an order requiring annual charges to be paid".²³⁰ Shortly thereafter, Mutual and Escondido filed

²²⁹Periods prior to the time the Commission is formally asked to fix annual charges.

²³⁰The requests for readjustment or payment of annual charges were independent of the petitions to intervene and, therefore, are treated herein as separate petitions.

a motion for withdrawal of their application to transfer the license; later, Mutual filed an application for a new license; and even later, Escondido joined in that application.

Since the issuance of the power license herein to Escondido as a joint licensee with Mutual and Vista will accomplish substantially what was attempted by the application to transfer the license, it is equitable that Mutual accept the liabilities which are associated with the benefits of its action. Accordingly, annual charges for the use of the La Jolla and Rincon Indian Reservations will be fixed for the period which commenced September 23, 1969, and annual charges for the use of the San Pasqual Indian Reservation will be readjusted for the period which commenced May 26, 1970. As a result, Mutual will be obligated to pay annual charges from the times of the formal requests in the license transfer proceeding.

In this connection, we reject Mutual's, Escondido's and Vista's contention that the Commission can readjust annual charges only as of the twentieth, thirtieth and fortieth anniversaries after a project is available for service, and that the Commission cannot fix or readjust such charges in this instance because no request had been made as of the fortieth anniversary (June 25, 1964). The "rigidity of the 20 and 10 year periods," of which the Court spoke in *Montana III*, *supra*, 459 F.2d, at 869, referred to the fact that annual charges which are fixed in connection with the issuance of a license are applicable to no less than the first twenty years of service, and annual charges which are readjusted at a later time are applicable to no less than a ten year period, subject, of course, to termination of the license. Section 10(e) states in this connection, that annual charges may be readjusted "at periods of *not less than* ten years thereafter"

(emphasis added), referring to the initial readjustment at the end of twenty years. Clearly, if annual charges can be readjusted at periods of not less than ten years, they can be readjusted at periods of more than ten years and, consequently, as of dates other than anniversary dates of a project's availability for service.

Similarly, we reject their contention captioned, "The Commission Has No Jurisdiction to Readjust the Annual Charges In Annual Licenses." Section 15(a) authorizes the Commission to issue a new license if the United States does not take over a project "at the expiration of the original license", and then goes on to say that if the Commission doesn't issue a new license it shall issue annual licenses "under the terms and conditions of the original license". We construe the term "original" as so used, as distinguishing the expiring license from a "new" license which the Commission is authorized to issue, and not as referring to the terms imposed by the expiring license when it was originally issued. Accordingly, an annual license is issued under the terms and conditions of the expiring license as amended as of the time of its expiration. Our action herein amends Article 19 of Mutual's 1924 license as of September 23, 1969, with respect to the use of the La Jolla and Rincon Indian Reservations, and May 26, 1970, with respect to the use of the San Pasqual Indian Reservation. Accordingly, annual licenses embodying Article 19 as so amended prior to the expiration of Mutual's 1924 license, are issued in compliance with Section 15(a).

Fixing/Readjustment of Annual Charges

It is necessary to amend Mutual's 1924 license for Project No. 176 in order to fix annual charges for the use of the La Jolla and Rincon Indian Reservations and to readjust annual charges for the use of the San Pasqual Indian Res-

ervation. Although Mutual has no application pending with respect to that license which can be acted upon and conditioned by the Commission to fix and readjust annual charges, and although Section 6 of the Federal Water Power Act provided that "[l]icenses . . . may be altered . . . only upon mutual agreement between the licensee and the commission," nonetheless, *the Commission has authority to amend a license without the consent of the licensee to fix or readjust annual charges.*

Section 6 of the Federal Water Power Act also provided, "Each . . . license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act"; Mutual's 1924 license was so conditioned, and Mutual accepted the terms and conditions of the Federal Water Power Act. Among those conditions was the one in Section 10(e) which directed the Commission to fix reasonable annual charges for the use of Indian reservations, and which permitted readjustments of those charges. Accordingly, Mutual thereby agreed to pay such reasonable annual charges as might be fixed or readjusted by the Commission. If, on the other hand, Mutual could avoid payment of such annual charges ordered under an open-ended license condition such as Section 10(e) simply by refusing to agree to a license amendment to that effect, the Commission's authority under Section 10(e) would be vitiated.

Section 6 must be read in conjunction with Section 10(e). An alteration or amendment of a license ordinarily requires the licensee's consent to give the licensee an opportunity to consider whether the prospective amendment is consistent with the integrity of the license. Annual charges, on the other hand, are subject to readjustment from time to time so that their reasonableness can be assured throughout the term of the license. Upon consideration of the purposes of the two provisions, we have concluded that an amendment

which assures the reasonableness of annual charges would not impair the integrity of the license and, consequently, that a license can be amended to carry out the purpose of the readjustment provision of Section 10(e) without conflicting with the purpose of the consent requirement of Section 6.²³¹

The parties have generally failed in their approaches to fixing and readjusting annual charges under Mutual's 1924 license for Project No. 176 because *annual charges for the use of tribal lands can be fixed or readjusted only for the use, occupancy and enjoyment of those lands contemplated by the license*. It was appropriate for the parties to consider the Henshaw facilities and the water associated with their operation in their approaches to annual charges under the power license issued herein because that license includes the Henshaw facilities. But, as we have indicated, Mutual's 1924 license was generally limited to the Escondido Canal, the Wohlford development and the water appropriated by Mutual's predecessor. And, as a result, the ongoing benefits derived by Mutual and Vista from Henshaw-appropriated water are not within the contemplation of Mutual's 1924 license. While any damages the Bands may have incurred in Mutual's and Vista's realization of those benefits may be compensable under Section 10(c), or otherwise, the realization of those benefits is not compensable through the

²³¹No form acknowledging acceptance of the amendment to Article 19 of Mutual's 1924 license for Project No. 176 is appended to this Opinion and order, as in the case of the two licenses which are issued herein. If Mutual does not file an application for rehearing pursuant to Section 313(a) of the Federal Power Act asserting that we erred, it will in fact have consented to it. The situation is analogous to the claim of an Indian/Interior veto power over annual charges which is discussed under LICENSING ISSUES — Section 10(e), as to which the District of Columbia Circuit said in *Montana III*, *supra*, 459 F.2d, at page 874, "As is the situation with the Tribes, the Secretary can participate as a party and avail of the provisions for judicial review."

payment of annual charges. The parties' approaches generally intertwine annual charges with damages and are rejected because the Commission has no authority to adjudicate claims for money damages.

In the absence of an acceptable approach of the parties, Article 30 of the power license issued herein has been adapted to Article 19 of Mutual's 1924 license for Project No. 176.

The definitions in Article 19 of the terms "Cost of Canal Water" and "Cost of Alternative Water" (1) accept the 1912 quantification of Mutual's natural flow entitlement as being 4,143 acre-feet per year, and (2) assume that the three Bands are to receive compensation under the license based on that amount of water each year.²³² The definition of "Cost of Canal Water" accepts the fact that Project No. 176 and the Henshaw development have been operated as a single unit of development by including fractional parts of the costs of operating both, but it differs from its Article 30 counterpart in that it gives effect only to the fractional part of the aggregate operating costs which Mutual's natural flow entitlement (4,143 acre-feet) bears to the number of acre-feet leaving the Escondido Canal for the year. The definition of "Cost of Alternative Water", on the other hand, considers only Mutual's replacement costs and the replacement of only 4,143 acre-feet.

Since the "Net Water Benefit" is thereby designed to reflect Mutual's natural flow entitlement and to exclude

²³² There is no need to reduce that compensation for the amounts of water released to the Rincon Band. A copy of the agreement of November 10, 1922, in which Mutual agreed to satisfy the Rincon Band's natural flow entitlement from its own natural flow entitlement, was not furnished to the Commission until the license was prepared and tendered in 1924 and therefore, Mutual's agreement to satisfy the Rincon Band's entitlement from its own is not within the contemplation of the license. Accordingly, there is no need to consider Gross Canal Water or Gross Water Benefits under Mutual's 1924 license as amended herein.

Henshaw-impounded water, 50% of the Net Water Benefit is allocated to Mutual as the Licensee and owner of the improvements, and the other 50% is allocated among the beneficial owners of the lands (including Mutual, Vista and the three Bands) occupied by the Escondido Canal and the Wohlford development. As shown in Appendix B, such a 50/50 division corresponds to the unshaded portion of the allocation arrow.

The 50% of the Net Water Benefit is allocated among the beneficial owners of the lands occupied by the Escondido Canal and the Wohlford development in the same manner as under the power license issued herein. However, there is no need to consider adjustments for releases of water in crediting annual charges to the respective Bands. The determination and allocation of the "Net Rincon Power Benefit" is also the same as under the power license issued herein.²³³

Reasonableness of Annual Charges

Although the amounts of annual charges to be paid for past and future periods will be determined from submitted data by the Director, Division of Licensed Projects, or his Deputy, in accordance with Article 30 of the power license issued herein and Article 19 of Mutual's 1924 license as amended herein, the reasonableness of the charges resulting from the application of the formulae will be illustrated through 5-year averages of fiscal 1970-75 data, which are the most recent periods for which data are furnished in the record.

²³³The \$8.00 per mile readjustment for the 100-foot wide right-of-way for the former Rincon-Bear Valley transmission line is the amount formerly provided by 18 CFR § 11.21 for the use of lands of the United States for transmission lines only. The Commission, in its orders issued herein on July 14 and August 26, 1977, authorized the abandonment of that right-of-way and the termination of annual charges applicable thereto on the date of restoration of the lands.

Turning first to the water benefits of Project No. 176, it is assumed that the 5-year averages will represent a typical year under the power license issued herein. During that typical year Mutual will receive 6,114 acre-feet of water through the Escondido Canal (Exhibit B-143) at a cost of \$15.00 per acre-foot (Exhibit M-72), or a total of \$91,710; and Vista will receive 4,750 acre-feet (Exhibit B-143) at a cost of \$26.31 per acre-foot (Exhibit B-135), or a total of \$124,973. Together, they will receive 10,864 acre-feet of water at an aggregate cost of \$216,683.

MWD charged \$59.25 per acre-foot for domestic water in 1975-76 and \$26.25 per acre-foot for agricultural water.²³⁴ During that typical year Mutual's consumption ratio will be 57.2% domestic and 42.8% agricultural (Exhibit B-144), resulting in a weighted average cost of \$45.13 per acre-foot based on MWD's 1975-76 prices. Similarly, Vista's consumption ratio will be 59.0% domestic and 41.0% agricultural (Exhibit B-145), resulting in a weighted average cost of \$45.72 per acre-foot based on the same prices. Accordingly, Mutual will pay \$275,925 for 6,114 acre-feet, Vista will pay \$217,170 for 4,750 acre-feet and together they will pay \$493,095 for 10,864 acre-feet of water.

The difference between the \$493,095 which Mutual and Vista will pay for MWD water and their aggregate \$216,683 cost for San Luis Rey water, represents a Net Water Benefit of \$276,412.²³⁵ Of that amount, \$69,104, or 25%, will be

²³⁴Subject to certain surcharges.

²³⁵As indicated earlier, the Escondido Canal conveys an average of about 14,600 acre-feet per year consisting of 4,100 acre-feet representing Mutual's appropriation of the San Luis Rey River, 2,700 acre-feet representing Mutual's purchases of Henshaw-stored water from Vista, and 7,800 acre-feet representing Vista's appropriation of the San Luis Rey River. On the basis of different figures principally involving volumes which are closer to the foregoing, the Bands' witness Stetson utilized the sharing of the net benefits approach to derive a net water benefit of \$398,800. Since the cost of both San Luis Rey and MWD water obviously will change over time, the question of whether the differential in costs is \$398,800 or only \$276,412 is not as important as (1) noting from those figures the probable level of that differential during the early years under the new power license and (2) noting the allocation of that differential among the interested parties to determine

allocated to the Licensees (Mutual, Escondido and Vista) as the owners of the lands underlying and the improvements comprising the Henshaw development. Of the \$276,412, another \$103,654, or 37.5%, will be allocated to the Licensees as the owners of the improvements comprising the Escondido Canal and the Wohlford development. And the remaining \$103,654, or 37.5%, will be allocated among the beneficial owners of the lands underlying the Escondido Canal and the Wohlford development. Of that amount, \$54,449, or 52.53%, would be allocated to the United States as the annual charge for the use, occupancy and enjoyment of its lands other than tribal lands embraced within Indian reservations. And \$25,675, or 24.77%, would be allocated to the three Bands as the total annual charge for the use, occupancy and enjoyment of their tribal lands.

During that illustrative typical year, 1,427 acre-feet of water will be released to the Rincon Band (Exhibit B-143).²³⁶ If the water is not released, Mutual will receive 6,917 (6,114 + 803) acre-feet²³⁷ at a total cost of \$91,710²³⁸, and Vista will receive 5,374 (4,750 + 624) acre-feet at a total cost of \$124,973. Together, they will receive 12,291 acre-feet at an aggregate cost of \$216,683. Mutual will pay \$312,164 for 6,917 acre-feet of MWD water, Vista will pay \$245,699 for 5,374 acre-feet and together they will pay \$557,863 for

²³⁶The releases will be less than 12% of the Gross Canal Water and, consequently, there will be no reimbursement of the Cost of Canal Water under Article 31.

²³⁷Diversions of water from the Escondido Canal to the three Bands will be allocated ratably among the Licensees in computing the Gross Water Benefit. Since Mutual will receive 6,114 acre-feet representing 56.28% of the total of 10,864 acre-feet, 56.28% of the 1,427 acre-feet released to the Rincon Band, or 803 acre-feet of water, will be allocated to Mutual. Similarly, 43.72% or 624 acre-feet, will be allocated to Vista.

²³⁸The total cost will not go up if the water is not released; the cost per acre-foot will go down.

12,291 acre-feet. The difference between the cost of MWD water and the cost of San Luis Rey water will be \$341,180, which is the Gross Water Benefit without diversions of water to the Rincon Band.

37.5% of the Gross Water Benefit of \$341,180, or \$127,943, will be allocated among the beneficial owners of the lands underlying the Escondido Canal and the Wohlford development. Of that amount, 24.77% or \$31,691, will be allocated to the three Bands. Tentatively, \$9,849, or 31.08% of the \$31,691, would be allocated to the La Jolla Band; \$6,440, or 20.32%, to the Rincon Band; and \$15,402, or 48.60%, to the San Pasqual Band.

The difference between the aggregate tentative credits of \$31,691 and the annual charge of \$25,675, or \$6,016, will be allocated to the three Bands ratably according to the respective volumes of water diverted to their tribal lands. In the illustrative typical year, the entire \$6,016 will be deducted from the tentative credit of the Rincon Band since it will be the only one to receive water from the Escondido Canal. Accordingly, annual charges of \$9,849 will be credited to the La Jolla Band; \$424, to the Rincon Band; and \$15,402 to the San Pasqual Band.

If the illustrative typical year had been one under Mutual's 1924 license as amended herein, Mutual would have received its entitlement of 4,143 acre-feet of water at a cost of \$19.95 per acre-foot,²³⁹ or a total of \$82,653. And Mutual would have paid \$45.13 per acre-foot, or \$186,974, for an equal volume of MWD water. The difference, or Net Water Benefit, would have been \$104,321. 50% of the Net Water Benefit, or \$52,161, would have been allocated among the

²³⁹As illustrated, the Cost of Canal Water under Article 30 of the power license issued herein will be \$216,683 for 10,864 acre-feet, or \$19.95 per acre-foot.

beneficial owners of the lands underlying the Escondido Canal and the Wohlford development. Of that amount, 52.53%, or \$27,400 would have been allocated to the United States as the annual charge for the use, occupancy and enjoyment of its lands other than tribal lands embraced within Indian reservations. And 24.77%, or \$12,920, would have been allocated to the three Bands as the total annual charge for the use, occupancy and enjoyment of their tribal lands. Annual charges of \$4,016, or 31.08%, would have been credited to the La Jolla Band; \$2,625, or 20.32% to the Rincon Band; and \$6,279, or 48.60%, to the San Pasqual Band.

Turning to the Net Rincon Power Benefit of Project No. 176, again it is assumed that the 5-year averages (all of which are derived from Exhibit B-147) represent a typical year under the power license issued herein as well as Mutual's 1924 license as amended herein. During that typical year, as shown in the accompanying computation, Rincon Power Revenues of \$15,131 would be derived from the sale of 653,925 kilowatt-hours of electricity generated by the Rincon power plant and the resale of an additional 293,075 kilowatt-hours purchased from SDG&E. The Cost of Rincon Power would be \$11,984, of which \$6,228 would be attributable to generating the 653,925 kilowatt-hours, and \$5,756 would be attributable to purchasing the additional 293,075 kilowatt-hours.²⁴⁰ The excess of the Rincon Power Revenues over the lower Cost of Rincon Power would be \$3,147, which is the Net Rincon Power Benefit. Accordingly, an annual charge of 50% of that amount, or \$1,574, would be credited to the Rincon Band.

²⁴⁰It should be observed that the loss from the purchase and resale of the 293,075 kilowatt-hours is reflected in the computation to reduce the Net Rincon Power Benefit.

COMPUTATION OF NET RINCON POWER BENEFIT

Revenues	Kilowatt- Hours	Cents Per Kilowatt- Hour	Total Revenues
<u>Generated Power</u>			
Sale to Rincon Band	109,645	0.125**	\$ 137
Sale to SDG&E	544,280	1.947	10,598
	<u>653,925</u>		<u>\$10,735</u>
<u>Purchased Power</u>			
Resale to Rincon Band	293,075*	1.500**	4,396
<u>Rincon Power Revenues</u>	<u>947,000</u>		<u>\$15,131</u>
Expenses	Kilowatt- Hours	Cents Per Kilowatt- Hour	Total Costs
Generating Costs	653,925	0.0095	\$ 6,228
Purchasing Costs	293,075*	1.964	5,756
<u>Cost of Rincon Power</u>	<u>947,000</u>		<u>\$11,984</u>

*Excludes 54,165 purchased kilowatt-hours not sold to the Rincon Band.

**Fixed under the agreement of February 2, 1914.

Ideally, amounts of annual charges for the use, occupancy and enjoyment of tribal lands should equal the amounts which would be fixed by willing Indian landowners and willing developers of water power in a free-bargaining environment. In view of the regulation imposed by the Federal Power Act, however, and particularly when constructed projects are sought to be licensed or relicensed, such an environment does not exist and, consequently, such ideal results are only a goal.

Mutual, Escondido and Vista have indicated that they "would agree that annual charges could be fixed at \$10,000." Although the Bands and Interior are not that explicit, it appears that they are seeking for the Bands annual charges which would approach as closely as possible the approximate \$400,000 attributed by their witnesses to the

water benefits and Rincon power benefits of Project No. 176. We think that \$10,000 is unreasonably low in view of the economic value of Project No. 176 (including the Henshaw development), and that the Bands are trying to exact an unreasonably large portion of those benefits. The formulae which are adopted herein should provide annual charges, as illustrated, more nearly representing the amounts which would be fixed in a free-bargaining environment and should, therefore, produce reasonable results.

Interest on Back Annual Charges

Although Mutual, Escondido and Vista oppose the payment of interest on annual charges applicable to past periods which are fixed or readjusted herein, the Bands, Interior and the Commission staff support the payment of interest at 7% per annum. We believe that Mutual should pay interest on the annual charges which are found herein to be fair and reasonable. Of course, in the case of annual charges applicable to the San Pasqual Indian Reservation, the interest will be on the difference between those actually paid and those which are found herein to be fair and reasonable.

The rate of interest should approximate the prevailing commercial rate of return. In refunds of excessive rates and charges under the Federal Power Act, that rate is currently fixed by 18 CFR § 35.19a at 7% per annum on excessive rates and charges collected prior to October 10, 1974, 9% per annum on accruals on and after that date applicable to collections prior to that date, and 9% per annum on excessive rates and charges collected on and after that date. Upon increasing the interest rate applicable to refunds from 7% to 9% in Order No. 513 issued October 10, 1974, the Commission explained that it "must reflect a variety of money market rates." Accordingly, that dual-rate approach is the Commission's latest pronouncement of the prevailing com-

mercial rate of return. We know of no reason why it should not be applied to the present situation and, therefore, a new paragraph (g) is being added to Article 19 of Mutual's 1924 license, as amended, to provide for interest at 7% per annum prior to October 10, 1974, and 9% per annum on and after that date, to the date(s) of payment.

Cease and Desist Order

As indicated in Footnote 72, a document entitled "Draft Environmental Impact Report of the Modification of Henshaw Dam and Warner Ranch Ground Water Program" dated May 1978, has been submitted on behalf of Vista to the Commission for comment. As discussed under JURISDICTION — The Henshaw Facilities and Water Rights, the facilities which are the subject of Vista's draft environmental report are being operated with the facilities of Project No. 176 as part of a single undertaking and must, therefore, be licensed under the Federal Power Act.

Mutual's 1924 license for Project No. 176 is subject to the terms and conditions of the Federal Water Power Act as in effect at the time of its issuance, including Section 10(b) which provided,

"That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alternation or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of a capacity in excess of one hundred horsepower without the prior approval of the commission. . . ."

Notwithstanding that provision and its embodiment in Article 4 of Mutual's 1924 license, Mutual and Vista's predecessor cooperated throughout the middle and late 1920's in enlarging, lining and otherwise altering the Escondido Canal and in constructing concrete diversion facilities to

replace the original diversion tunnel, all without obtaining the *prior* approval of the Commission. As late as 1948-49 the Escondido Canal was rerouted from Bear Valley Creek and through a 6,000-foot, 45-inch pipeline on the San Pascual Indian Reservation, which was the occasion for the \$25 annual charge when the rerouting was ultimately approved in 1957.

The same statutory and license provisions continue to be applicable to Vista's actions during the periods of the annual licenses issued pursuant to Section 15(a). In view of the history of modifying Project No. 176 without obtaining the prior approval of the Commission, and the proposals which are contained in Vista's draft environmental report together with our position on licensing the affected facilities, Vista is precluded by Ordering Paragraph (E) of this Opinion and order from going forward with its proposals pertaining to Henshaw Dam and the Warner Ranch well field until they are considered and acted upon by the Commission.

The power license issued herein subjects Project No. 176 to the terms and conditions of the Federal Power Act (as distinguished from the Federal Water Power Act), including Section 10(b) which now applies to installed capacities in excess of 2,000 horsepower and, therefore, excludes Project No. 176. Nonetheless, Article 3 of Form L-16 (which is applicable to projects not exceeding 2,000 horsepower) contains essentially the same terms and conditions and, therefore, Ordering Paragraph (E) precludes Vista from going forward with its proposals after the power license is issued herein, as well as before.

Under all of the facts and circumstances, particularly with respect to the seriousness with which we view matters affecting the safety of dams, we believe that Ordering Paragraph (E) is in the public interest and an appropriate exercise of our authority under Sections 4(g) and 309 of the Federal Power Act, among other provisions.

Interim Operating Order

Although all issues pertaining to the disposition of San Luis Rey water will be resolved upon the issuance herein of a new power license for Project No. 176, the possibility remains that the effective date of that license may be stayed pursuant to Section 14(b) of the Federal Power Act²⁴¹ or a court order.

The Commission's finding that Mutual's 1924 license "will not interfere or be inconsistent with the purpose for which any reservation affected thereby was created or acquired", was premised upon its "full understanding of the . . . project" conveyed by the Section 9(a) exhibits. That understanding, however, was inconsistent with the arrangements within the agreement of November 10, 1922, and, as a result, the affected tribal lands have been used in a manner which was different from, or in addition to, the uses contemplated by those exhibits. We have indicated, in this connection, that while Mutual's 1924 license does not authorize the conveyance of Henshaw-impounded water, including pumped water, or the joint use and control of the licensed project works by Vista, the affected tribal lands have been used to convey such water, and have been used in part to benefit Vista and have been subject to Vista's partial control.

We have also indicated that the adequacy of the Rincon Band's water supply has eroded during the term of Mutual's 1924 license, and that the combined authorized and unauthorized operation of Project No. 176 thereunder is interfering and inconsistent with the purpose of the Rincon Indian Reservation. We indicated, additionally, that Project No. 176 as so operated is impairing or interfering with the La

²⁴¹Such a stay would operate only with respect to the effective date of Ordering Paragraphs (B) and (C) hereof, issuing the two licenses.

Jolla water supply, although speculatively so, and that the interference or inconsistency with the purpose of the Rincon Indian Reservation is a classic case. In view thereof, Article 29 of the power license issued herein is designed to preclude any possible interference or inconsistency of that license with the purpose for which the La Jolla, Rincon and San Pasqual Indian Reservations were created.

Accordingly, any stay of the issuance of a new power license for Project No. 176 will prolong the existing interference or inconsistency by the combined authorized and unauthorized operation of Project No. 176 under Mutual's 1924 license, with the purpose for which the Rincon and arguably the La Jolla Indian Reservations were created, unless, of course, such a result is precluded by this Opinion and order.

The power license issued herein does not attempt to terminate the unauthorized use and control of Project No. 176 because it is not in the public interest to close the water gates of Escondido and Vista, in whole or in part, at least presently, before the three Bands have developed a present capability of using the water. Instead, the license regulates that use and control through Article 29, which conditions it in such a manner as not to interfere or be inconsistent with the purpose for which the three reservations were created. Accordingly, we find that it is appropriate, expedient and in the public interest to conserve and utilize the water power resources of the region by implementing Article 29 currently, through Ordering Paragraph (F), in the event of any stay of the effective date of the new power license for Project No. 176.

Ordering Paragraph (F) is based principally on the Commission's broad authority under Section 4(g) of the Federal Power Act "to issue such order as it may find appropriate, expedient and in the public interest to conserve and utilize

the . . . water power resources" of a region after having investigated the occupancy of the public lands and reservations used for the purpose of developing electric power. Section 4(g) was enacted in 1935 to

"enable the Commission to conduct its own investigations instead of waiting for matters to be brought formally to its notice, and to proceed directly to prevent violations, instead of having to call upon . . . the Attorney General to take action."²⁴²

Ordering Paragraph (F) is not, and should not be construed as, an attempted unilateral amendment of Mutual's 1924 license. It is an exercise of the Commission's authority to remedy violations of the laws administered by it and licenses issued under those laws, in which the terms and conditions of such remedial action are expressed, conveniently, by directing Mutual and Vista to comply with Article 29 of the power license issued herein if the effective date of that license is stayed.

Ordering Paragraph (F) hopefully will terminate, or at least mitigate during the period of a stay, the continuing interference with the Rincon water supply. And it should enable the La Jolla, Rincon and San Pasqual Bands to advance the formulation of concrete plans, including financing commitments, for utilizing the water.

²⁴²Senate Report No. 621, 74th Congress, 1st Session, at page 43.

We could request the Attorney General pursuant to Section 26 to institute legal proceedings to remedy or correct the violations of the Federal Water Power and Federal Power Acts and Mutual's 1924 license which are found herein, and hopefully obtain a court order similar to Ordering Paragraph (F). But in view of the time needed for such litigation, and the fact that a stay pursuant to Section 14(b) will take effect, if at all, automatically within 30 days of the issuance of this Opinion and order (18 CFR § 16.10), Section 4(g) obviously provides a better vehicle for remedying the continuing unauthorized use and control of Project No. 176.

MISCELLANEOUS MATTERS

Preference Issue Not Reached

On June 30, 1977, PGandE, which is not a party to this proceeding and is not a "municipality" within the purview of Section 3(7) of the Federal Power Act, filed a motion for leave to file an *amicus curiae* brief on exceptions, together with its brief, stating in the motion that it holds 32 water power licenses under the Federal Power Act and that it is approached by others, including municipalities, from time to time, claiming preferences against PGandE in prospective relicensings. PGandE contends in its brief that certain statements in the initial decision pertaining to relicensing preferences should not be regarded as authoritative because a preference issue did not in fact arise in the initial decision. No answers to PGandE's motion have been filed.

In view of PGandE's status as a non-municipality and a multiple licensee, PGand E could be affected materially if an aspect of this Opinion and order were to turn on a relicensing preference, and, consequently, we find that good cause has been shown to permit the filing of its brief. But with respect to the preference issue raised in PGandE's brief, we said under LICENSING ISSUES, Sections 10(a) and 7(a).

"Having determined that the Bands are not 'municipalities' (see Footnote 105), we do not reach or decide the question of whether municipalities have a preference under Section 7(a) over a prior non-municipality licensee, such as Mutual."

Accordingly, that issue has not been reached in this Opinion and order.

No Oral Argument

On June 15, 1977, the Chief Administrative Law Judge waived the 50-page limitation specified by 18 CFR § 1.31(b)(2) as being applicable to briefs on and opposing

exceptions. On September 6, 1977, Mutual, Escondido and Vista, and the Bands and Interior, filed their briefs on exceptions together with separate motions for oral argument. Subsequently, the staff filed a reply to the motions conceding that the issues are both novel and complex, but opposing oral argument on the grounds that the record is long and the briefs are comprehensive.²⁴³

After considering the motions and the reply, as well as the briefs and the record, we are satisfied that the parties have been given a fair opportunity to address the issues and that the briefs in fact address them adequately. As a result, we find that oral argument would not accomplish any substantial purpose and, in our discretion, that the motions should be denied.

No Supplemental Brief

On December 14, 1977, just before the briefs opposing exceptions were filed herein, an administrative law judge issued an initial decision in *Northern States Power Company*, Project No. 108, which thereupon became the second contested relicensing proceeding to reach the Commission for decision. On January 9, 1978, the Bands filed a motion for leave to file a supplemental brief, together with a short supplemental brief discussing aspects of that initial decision, stating in the motion that they seek leave to file the brief "for the sole purpose of bringing the Commission's attention to this important new development." Subsequently,

²⁴³The Bands and Interior filed a joint brief on exceptions consisting of 263 pages of argument and 120 pages of appendices, and Interior filed a separate 14 page brief. Mutual, Escondido and Vista filed a 79 page joint brief on exceptions, and Vista filed a separate 5 page brief. The Commission staff, on the other hand, filed a 49 page brief on exceptions. On December 15 and 16, 1977, the parties filed briefs opposing exceptions aggregating 117 pages. All briefs are typed single-space.

Mutual, Escondido and Vista, and the staff, filed separate oppositions to the motion.

18 CFR § 1.31(a) provides for the filing of briefs on and opposing exceptions, and concludes, "No further response will be entertained unless the Commission, upon motion or its own initiative, so orders." The proper method for calling the Commission's attention to a decision which is issued in close proximity to the filing of briefs, or subsequently, is to file a motion to lodge together with a copy of the decision to be lodged. A copy of the decision may be omitted, however, pursuant to 18 CFR § 1.26(c)(3), if it is issued in another proceeding before the Commission. In any event, a motion to lodge should not address the merits either of the proceeding under consideration or the decision to be lodged.

Under the circumstances, the Bands' motion will be treated as one to lodge a copy of the initial decision in *Northern States Power Company*, Project No. 108, and will be granted to that extent. We find that good cause has not been shown for leave to file the supplemental brief and, consequently, that the Bands' motion should be denied to that extent.

Statement of Environmental Factors

A draft environmental impact statement was prepared by the Commission staff and, on September 13, 1974, made available to interested parties pursuant to the National Environmental Policy Act of 1969, the guidelines established by the Council On Environmental Quality and Sections 2.80 and 2.81 of the Commission's General Policy and Interpretations. Similarly, a final environmental impact statement was prepared by the Commission staff after receiving and considering comments on the draft statement, and, on September 17, 1975, made available to interested parties. The final environmental impact statement is designated as

Exhibit S-60, was considered by the presiding administrative law judge and the Commission in reaching their respective decisions, and is our detailed statement on the factors specified in Section 102(2)(C) of the National Environmental Policy Act of 1969.

The Commission orders:

(A) The Initial Decision of the presiding administrative law judge issued in this proceeding on June 1, 1977, is (1) reversed insofar as it dismisses the applications for new licenses for Project Nos. 176 and 559, and (2) affirmed insofar as it terminates the complaint proceeding in Docket No. E-7562 and the investigation in Docket No. E-7655.

(B) With respect to the license for Project No. 176, and subject to a possible mandatory stay as provided in Section 14(b) of the Federal Power Act (Act) and §16.10 of the Commission's regulations under the Act:

(B-1) This new license is issued jointly to Escondido Mutual Water Company; City of Escondido, California; and Vista Irrigation District (Licensees), pursuant to Part I of the Act, for a period effective the first day of the month in which this license is issued, and terminating June 24, 2004, for the continued operation and maintenance of Escondido Project No. 176 occupying lands of the United States, including portions of the La Jolla, Rincon and San Pasqual Indian Reservations, on the San Luis Rey River and Escondido Creek in San Diego County, California, subject to the terms and conditions of the Act, insofar as not expressly waived herein, which Act is incorporated by reference as part of this license, and subject to the regulations the Commission issues under the provisions of the Act.

(B-2) Project No. 176 consists of:

(i) All lands, the use and occupancy of which are necessary or appropriate for the purpose of the project, con-

stituting the project area and enclosed by the project boundary, which area and boundary are shown in and described by certain exhibits which form part of the application for license and are designated and described as:

<u>Exhibit</u>	<u>Sheet</u>	<u>FERC No.</u>	<u>Showing</u>
J	1	176-47	General Map of Project
K	1A	176-76	Project No. 176 (Key Map)
K	2	176-77	Topographic Map — Conduit Intake Works, Road through Cuca Rancho and La Jolla Indian Reservation

(ii) All project works including:

(1) A 16-foot high concrete diversion dam having a 112-foot long crest on the San Luis Rey River, with sluice gates, wood head gates, a concrete control box, a suspension bridge, a 5-foot parshall flume and an operator's cottage.

(2) A 13.5 mile long water conduit (Escondido Canal) capable of conveying a flow of 70 cfs and consisting of approximately 58,404 feet of gunite lined canal, 3,567 feet of tunnel, 670 feet of metal flume, 2,156 feet of inverted siphon (42-inch diameter) and 6,118 feet of pipeline (45-inch diameter).

(3) A reservoir (Lake Wohlford) with a storage capacity of 6,943 acre-feet and a surface area of 224.4 acres, including a 100-foot high hydraulic fill dam facing on a rock fill dam on Escondido Creek, a reinforced concrete siphon and spillway with a concrete weir extension, an outlet tower with 36-inch gate valves at three levels, and outlet works consisting of 3,412 feet of 42, 48 and 50-inch pipeline.

(4) A power plant (Bear Valley) including an 830-foot penstock (24-inch diameter), an 1,800 square foot concrete powerhouse and three generating units with a total capacity of 520 KW.

(5) A power plant (Rincon) including a 2,125-foot penstock (12, 16, 18 and 20-inch diameter), a 900 square foot concrete powerhouse, two generating units with a total capacity of 240 KW and an operator's cottage.

(6) A reservoir (Lake Henshaw) with a gross storage capacity of 194,323 acre-feet and a surface area of 5,875 acres, impounded by a 155-foot high hydraulic fill dam on the San Luis Rey River and two saddle dams; a concrete spillway; outlet works and water conduits consisting of an outlet structure, 755 feet of outlet tunnel, a 48-inch butterfly valve control gate, and 265 feet of inlet tunnel; and pumping facilities consisting of approximately 25 wells in the Warner groundwater basin and ditches and pipelines from those wells to the reservoir.

(7) Telephone lines, power lines, access roads, trails and other appurtenant facilities, the location, nature and character of which are more specifically shown and described by the exhibits cited above and by certain other exhibits which also form part of the application for license and are designated and described as:

<u>Exhibit</u>	<u>Sheet</u>	<u>FERC No.</u>	<u>Showing</u>
L	1	176-59	Diversion Dam, Structures, Sections of Intake Conduit
L	2	176-60	Rincon Power Plant and Penstock
L	3	176-61	Plan and Sections of Lake Wohlford Dam Spillway
K	3	176-78	Topographic Map — Pack Trails; Tunnels 1, 2, 3 and 4; Portion of Conduit and Telephone Line
K	4	176-79	Topographic Map — Tunnel 7, Portion of Conduit and Telephone Line
K	5	176-80	Topographic Map — Rincon Powerhouse and Penstock, Portion of Conduit and Telephone Line, Access Roads

<u>Exhibit</u>	<u>Sheet</u>	<u>FERC No.</u>	<u>Showing</u>
K	5A	176-81	Topographic Map — Access Roads to Rincon Powerhouse
K	6	176-82	Topographic Map — Portions of Conduit, Telephone Line, Access and Service Roads, Lower Hell-hole Siphon
K	7A	176-83	Topographic Map — Portions of Conduit, Access Service Roads, Lower Hellhole Siphon
K	8A	176-84	Topographic Map — Portions of Conduit, Telephone Line, Access Roads
K	9	176-85	Topographic Map — Portion of Conduit, Forebay Structure
K	10	176-86	Topographic Map — Lake Wohlford Dam, Penstock, Outlet Tower, Forebay
L	4	176-62	Plan of Lake Wohlford Dam with Steel Sheet Piling, Section of Outlet Tower, Inlet and Outlet Tunnels, Outlet Pipe
L	5	176-63	Bear Valley Powerhouse and Penstock

Exhibit R: Consisting of:

- (1) A map entitled "Recreation Map of Lake Wohlford" (FERC No. 176-64).
- (2) Twenty pages of text entitled "Exhibit R-1" filed with the Commission on July 15, 1971, as a part of the application for new license for Project No. 175.

Exhibit S: Consisting of:

Eight pages of text entitled "Exhibit S" filed with the Commission on July 15, 1971, as a part of the application for new license for Project No. 176.

- (iii) All of the structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, and including such portable property as may be used or

useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as part of the project is approved or acquiesced in by the Commission; also, all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance or operation of the project.

(B-3) This license is also subject to the terms and conditions set forth in Form L-16 (as revised October 1975) entitled "Terms and Conditions of License for Constructed Minor Project Affecting Lands of the United States," which terms and conditions designated as Articles 1 through 26 are attached to and made a part of this license, except that Article 19 is modified to read as follows,

Article 19. The Licensees shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, crops, lands, or other property of the United States including non-allotted tribal lands of the La Jolla, Rincon and San Pasqual Indian Reservations (which are held in trust by the United States), occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under this license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

subject to modification throughout to reflect the issuance of this license to the joint Licensees as distinguished from a single licensee, and subject to the following special conditions which are set forth as additional articles:

Article 27. Within 6 months after issuance of this license, the Licensees shall file under Sections 5.1 and 5.2 of the Commission's regulations under the Act, for Commission approval, revised Exhibits H, J, K, L, M, N, O,

R, S, V and W conforming to Section 4.41 of the regulations, reflecting the inclusion of Henshaw Dam and Lake Henshaw within Project No. 176, together with the lands and other facilities, including the pumping facilities, which are associated with the operation and maintenance of Henshaw Dam and Lake Henshaw, and the water rights which are incident to them, and also reflecting:

(1) Any construction or reconstruction of project works which may be necessary or appropriate to cause Henshaw Dam and its associated facilities to be structurally sound, safe and adequate;

(2) A permanent water operating plan for Project No. 176, including without limitation: operating regimes for Lake Henshaw and Henshaw Dam; operating regimes for the Warner Basin pumping facilities, including any limitations on the amount of groundwater which may be extracted from the Warner Basin; the possibility of modifying flows in the San Luis Rey River between Henshaw Dam and the diversion dam for purposes of enhancing the existing fishery and developing a year-round fishery, and, in conjunction with the latter, benefitting incidentally the Pauma and Pala Basins; and the possibility of modifying flows through the powerhouses for the purpose of enhancing the generation of electric power consistent with other beneficial public uses of the water;

(3) Any construction or reconstruction of project works which may be necessary or appropriate to carry out the permanent water operating plan for Project No. 176; and

(4) The construction or reconstruction of project works which are necessary or appropriate to replace existing works on the San Pasqual Indian Reservation and permit abandonment of all or part of the project works on, and the restoration of, that reservation.

Article 28. In conjunction with or following the final disposition of the pending or any substituted litigation involving the water and related contractual rights which are incident to Project No. 176, and upon petition filed by any party or parties to that litigation, the Commission may modify this license in any manner considered appropriate in the light of the pending or concluded final disposition of that litigation.

Article 29. For the purpose of this Article 29, the term "Indian Service Area" is defined as consisting of those portions of the La Jolla and Rincon Indian Reservations situated generally to the south and west of Contour 1785 (mean sea level) which begins at the southern boundary of the La Jolla Indian Reservation, passes through the crest of the spillway of the diversion dam on the San Luis Rey River, crosses the boundary common to the two reservations and ends at the northern boundary of the Rincon Indian Reservation; plus, so long as the conduit mentioned in the second paragraph of this Article 29 continues to occupy any portion of the San Pasqual Indian Reservation, the eastern portion of the San Pasqual Indian Reservation, including the NW 1/4 of the NE 1/4 of Section 27, Township 11 South, Range 1 West, S.B.M., and that part of the southern portion of the San Pasqual Indian Reservation which is the SE 1/4 of the SW 1/4 of Section 27, Township 11 South, Range 1 West, S.B.M., which Indian Service Area is approximated by shading on Appendix A attached to and made a part of this license.

Subject to the provisions of Articles 28 and 31, the Licensees shall permit diversions of water from the conduit which begins at the diversion dam on the San Luis Rey River and ends at a terminal structure near Lake Wohlford (the Escondido Canal), in the volumes and flows which are authorized in writing by the Commission and can be and

are in fact utilized for domestic, agricultural, stockwatering or small commercial consumption within the Indian Service Area, and at the times and to the extent that sufficient volumes and flows are available in the Escondido Canal. Nothing in this Article 29 shall preclude the Licensees from closing the Escondido Canal or portions of the Escondido Canal for reasonable periods of time for maintenance and repairs or for other prudent reasons, or from restricting the flow in the Escondido Canal consistent with any operating plan for Project No. 176 approved by the Commission. Nothing in this Article 29 shall require the Licensees to provide distribution services without just compensation.

The La Jolla, Rincon and San Pasqual Bands of Mission Indians, as entities, or enrolled members or groups of members of the respective Bands evidencing written authority to do so, may apply for authorization to divert water from the Escondido Canal by filing petitions with the Commission (and transmitting copies to the Licensees) specifying the maximum annual volumes and the maximum periodic flows for which authorization is requested, together with copies of the plans and specifications for any diversion facilities to be installed or constructed, and evidence that the plans and specifications have been approved by the Licensees, or evidence of the Licensees' objections to the plans and specifications and the reasons why the plans and specifications cannot be changed, together with other reasonable information which may be requested by the Commission or the Licensees. Authority to act on such petitions is hereby delegated to the Commission officer who is then performing the functions which are performed at the time of issuance of this license by the Director of the Division of Licensed Projects, Office of Electric Power Regulation, or that officer's Deputy.

Any authorization to divert water from the Escondido Canal shall be on the following conditions:

(a) The Bands, members or groups of members having authorization shall install at such locations and operate and maintain, all at their expense, any metering or other measuring devices which the Licensees may reasonably request to monitor compliance with this Article 29 and with the authorization. (b) The Licensees may cause any such metering or other measuring device to be repaired if it is not first repaired within a reasonable time specified in a notice to repair, and may deduct the cost of repairs from the amount of annual charges which are next payable. (c) The Licensees shall have reasonable access to the La Jolla, Rincon and San Pasqual Indian Reservations for such monitoring purposes.

Article 30. The Licensees shall pay to the United States the following annual charges, effective as of the first day of the month in which this license is issued:

(i) For the purpose of reimbursing the United States for the cost of administration of Part I of the Federal Power Act, a reasonable annual charge as determined by the Commission from time to time in accordance with its regulations. The authorized installed capacity for this purpose is 1,010 horsepower.

(ii) For the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands other than tribal lands embraced within Indian reservations, a reasonable annual charge determined by multiplying thirty-seven and one-half percent of the Net Water Benefit of Project No. 176, by a percentage which shall be determined by dividing the aggregate distance in feet traversed by the Escondido Canal through the lands of the United States other than tribal lands embraced within Indian res-

ervations, by the sum of (a) the total distance in feet traversed by the Escondido Canal from Station 1 through Station 302A, inclusive, and (b) the distance in feet traversed from Station 302A to Station 303 of the Escondido Canal and through a 36-inch diameter concrete pipe; an additional conduit; a 320-foot long, 42-inch diameter concrete pipe; Escondido Creek and Lake Wohlford to the outlet tower, and then through the 4,195-foot long outlet pipe and penstock, which distances are to be determined as of the beginning of the calendar year.

(iii) For the purpose of recompensing the United States for the use, occupancy and enjoyment of the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, other than the tribal lands within the Rincon Indian Reservation which are used and occupied for the generation of electric power, and other than certain tribal lands within the La Jolla, Rincon and San Pasqual Indian Reservations which are used and occupied for communication and other services by wire, a reasonable annual charge determined by multiplying thirty-seven and one-half percent of the Net Water Benefit of Project No. 176, by a percentage which shall be determined by dividing the aggregate distance in feet traversed by the Escondido Canal through the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, by the sum specified in subparagraph (ii) above.

(iv) For the purpose of recompensing the United States for the use, occupancy and enjoyment of the tribal lands embraced within the Rincon Indian Reservation which are used and occupied for the generation of electric power, a reasonable annual charge equal to fifty per cent of the Net Rincon Power Benefit of Project No. 176.

(v) For the purpose of recompensing the United States for the use, occupancy and enjoyment of tribal lands

embraced within the La Jolla, Rincon and San Pasqual Indian Reservations which are used and occupied for communication and other services by wire, a reasonable annual charge determined by the Commission from time to time in accordance with its regulations for recompensing the United States for the use, occupancy and enjoyment of its lands (for transmission line rights-of-way only) other than tribal lands embraced within Indian reservations; provided, that such annual charge shall be one-half of that amount for any year with respect to any tribal lands which are used, occupied and enjoyed for communication and other services by wire, by both the Licensees and residents of the respective reservations.

For the purpose of subparagraph (iii) of this Article 30, and Article 31: The term "Net Canal Water" is defined as the volume of water which leaves the conduit Escondido Canal during a calendar year, as measured at or near the terminal structure near Lake Wohlford. The term "Gross Canal Water" is defined as the sum of the Net Canal Water and the aggregate measured volumes of water which are diverted from the Escondido Canal during the same calendar year pursuant to Article 29. The term "Cost of Canal Water" is defined as the cost to the Licensees of operating the water supply facilities of Project No. 176 during a calendar year. The term "Cost of Alternative Water" is defined as the computed cost to the Licensees of obtaining the least expensive water equal in volume to their respective percentage shares of Net Canal Water for a calendar year, as weighted for their respective percentage domestic/agricultural distribution patterns for the same calendar year. And the term "Net Water Benefit" is defined as the difference between the Cost of Alternative Water and the lower Cost of Canal Water for a calendar year.

For the purpose of subparagraph (iv) of this Article 30: The term "Cost of Rincon Power" is defined as the sum of the cost to the Licensees of operating and maintaining the Rincon power facilities (including property taxes and amortization attributable thereto), and all demand, energy and other charges incurred for power purchased and resold to the Rincon Band of Mission Indians, during a calendar year. The term "Rincon Power Revenues" is defined as the sum of all demand, energy and other charges invoiced for power generated by the Rincon power facilities, and for power purchased and resold to the Rincon Band of Mission Indians, during the same calendar year. And the term "Net Rincon Power Benefit" is defined as the difference between the Rincon Power Revenues and the lower Cost of Rincon Power for a calendar year.

The said annual charges in subparagraph (iii) above for the use, occupancy and enjoyment of tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations shall be placed to the credit of the La Jolla, Rincon and San Pasqual Bands of Mission Indians, respectively, as follows: First, the Cost of Alternative Water to the respective Licensees shall be recomputed by utilizing Gross Canal Water instead of Net Canal Water, and the lower Cost of Canal Water shall be deducted to derive a Gross Water Benefit as though the respective Bands diverted no water from the Escondido Canal during the calendar year. Second, thirty-seven and one-half percent of the Gross Water Benefit of Project No. 176, multiplied by the percentage specified in subparagraph (iii) above, shall be placed tentatively to the credit of the respective Bands in proportion to the respective distances traversed by the Escondido Canal through their respective tribal lands, which distances are to be determined as of the beginning of the calendar year. And third, the difference between the aggregate amounts which are so

placed tentatively to the credit of the respective Bands and the annual charge paid by the Licensees as provided in subparagraph (iii) above, shall be deducted from the said tentative credits in proportion to the measured volumes of water diverted from the Escondido Canal to the respective tribal lands pursuant to Article 29 during the calendar year, and the remaining amounts shall be placed to the credit of the La Jolla, Rincon and San Pasqual Bands of Mission Indians, respectively.

The said annual charges in subparagraph (iv) above for the use, occupancy and enjoyment of tribal lands embraced within the Rincon Indian Reservation shall be placed to the credit of the Rincon Band of Mission Indians. And the said annual charges in subparagraph (v) above for the use, occupancy and enjoyment of tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations shall be placed to the credit of the La Jolla, Rincon and San Pasqual Bands of Mission Indians, respectively, in proportion to the acreage occupied within their respective reservations by the rights-of-way for the transmission lines for which the annual charges are imposed.

The Licensees shall install, operate and maintain at their expense a metering or other measuring device at or near the terminal structure of the Escondido Canal.

The Licensees shall file with the Commission and serve upon designees of the La Jolla, Rincon and San Pasqual Bands of Mission Indians and the Department of the Interior, on or before February 1 of each year, a statement under oath showing all of the information which is necessary or useful for the computation and crediting of annual charges as provided in Article 29 and this Article 30, together with their computations. The La Jolla, Rincon and San Pasqual Bands of Mission Indians and the Department of the Interior may file with the Commission and transmit to the Licensees,

and the others mentioned in this paragraph, on or before March 1 of each year, a statement under oath in opposition to the said information and computations. Such statements shall be considered and acted upon by the Commission officer who is then performing the functions which are performed at the time of issuance of this license by the Director of the Division of Licensed Projects, Office of Electric Power Regulation, or that officer's Deputy, to whom authority to so act is hereby delegated.

Article 31. The La Jolla, Rincon and San Pasqual Bands of Mission Indians shall reimburse the Licensees in accordance with the following schedule for that part of the "Cost of Canal Water," as that term is defined in Article 30, which is applicable to the facilities of Project No. 176 situated upstream from the metering or other measuring device to be installed and maintained pursuant to Article 30 at or near the terminal structure of the Escondido Canal:

Aggregate Measured Volumes of Water Diverted Pursuant to Article 29, as a Percentage of Gross Canal Water		Percentage of Specified Part of Cost of Canal Water to be Reimbursed
<u>At Least</u>	<u>But Less Than</u>	
—	12%	Zero
12%	13	1.5%
13	14	3.0
14	15	4.5
15	16	6.0
16	17	7.5
17	18	9.0
18	19	10.5
19	20	12.0
20	21	13.5
21	22	15.0
22	23	16.5

<u>At Least</u>	<u>But Less Than</u>	
23	24	18.0
24	25	19.5
25	26	21.0
26	27	22.5
27	28	24.0
28	29	25.5
29	30	27.0
30	31	28.5
31	32	30.0
32	33	31.5
33	—	The percentage of Gross Canal Water

The Cost of Canal Water, the Gross Canal Water and the measured volumes of water which are diverted pursuant to Article 29 shall be the same as are ultimately approved pursuant to Article 30 by the Commission officer specified therein; and the amounts to be so reimbursed shall be apportioned among the La Jolla, Rincon and San Pasqual Bands of Mission Indians in accordance with the measured volumes of water diverted to their respective tribal lands, and shall be due and payable to the Licensees on the date on which annual charges are payable by the Licensees to the United States.

The obligation of the Licensees under Article 29 to permit diversions of water to the respective tribal lands of the La Jolla, Rincon and San Pasqual Bands of Mission Indians shall be suspended during any period of time in which the amount due from a particular Band under Article 30 or this Article 31 remains unpaid.

Article 32. The Licensees shall use their best efforts to negotiate a reasonable contract with the San Pasqual Band of Mission Indians which arguably may be required by Section 8 of the Mission Indian Relief Act or Section 16 of the Indian Reorganization Act, or both such statutes, to permit

the construction of facilities for the conveyance of water across the San Pasqual Indian Reservation, and the operation and maintenance of those and existing facilities and the utilization of the rights-of-way through the San Pasqual Indian Reservation occupied by all such facilities throughout the maximum possible term of this license, including the terms of possible annual licenses which may be issued after the expiration of this license; and the Licensees shall also use their best efforts to obtain the approval of the Secretary of the Interior. Copies of any such contract and any documents evidencing its approval, with or without conditions, or its non-approval, shall be filed with the Commission for consideration in conjunction with the exhibits to be filed pursuant to Article 27 for the construction or reconstruction of project works to replace existing works on the San Pasqual Indian Reservation.

Article 33. Access roads and pack trails may be relocated pursuant to advance agreement in writing between the Licensees and the beneficial owner of the affected land who, in the case of the La Jolla, Rincon and San Pasqual Indian Reservations, shall be deemed to be the Band whose reservation is affected, subject to any approval required by law. Promptly upon the completion of any such relocation, the Licensees shall file for Commission approval appropriate Exhibit K drawings showing the roads and/or trails as so relocated.

Article 34. The Licensees shall use their best efforts to fulfill all of their valid contractual obligations to supply electric power and water to the Bands of Indians residing on the La Jolla, Rincon, San Pasqual, Pala and Pauma (including the Yuima) Indian Reservations, subject to the terms and conditions of this license and of all valid contracts between one or more of the Licensees (or their predecessors) and one or more of the said Bands (or the United States or

the Secretary of the Interior on behalf of one or more of the said Bands).

For the purpose of this Article 34: Contracts and contractual obligations shall be treated as "valid" until determined otherwise by a court of competent jurisdiction and the final disposition of that proceeding, or until superseded by a later contract which terminates the earlier contract and/or contractual obligation. The obligation under the agreement of June 28, 1922, to drill wells and construct facilities to furnish the Pala Band of Mission Indians "with the quantity of water for irrigation purposes to which they are entitled" shall be treated as one to furnish that Band with a minimum flow of three cubic feet per second.

The Licensees shall install, operate and maintain at their expense a metering or other measuring device at or near the eastern boundary of the Pala Indian Reservation.

Article 35. Promptly, and no later than three months from the effective date of this license, the Licensees shall file with the Commission and implement an emergency action plan to provide early warning to upstream and downstream inhabitants, property owners, operators of water-related facilities, and other persons who might be affected, whenever there is a threatened or actual sudden release of water resulting from accident, natural disaster, or failure of project works. That plan shall include: (a) instructions to be provided on a continuing basis to operators and attendants for actions they are to take throughout such an emergency, including actions to reduce inflows to reservoirs to the extent possible, such as by limiting outflows from upstream dams or control structures and actions to reduce downstream flows to the extent possible, such as by limiting outflows from dams or control structures on tributary waterways; and (b) detailed plans for notifying, and documenting the time of notice to, the potentially affected persons, as well as inter-

ested federal, state and local authorities, including law enforcement and medical units. The Licensees shall file with that plan a summary of the study used for determining the upstream and downstream areas which could be affected by a sudden release of water, including all criteria and assumptions used. The Licensees shall monitor any changes in upstream or downstream conditions which might influence possible flows or affect areas or persons susceptible to harm, and shall promptly file with the Commission any necessary or desirable resulting changes in the emergency action plan and underlying study. In any event, not less often than every three years, the Licensees shall determine any changes in conditions which would make changes in the existing emergency action plan and underlying study necessary or desirable, and shall promptly file with the Commission and implement those changes, or notify the Commission in writing that they have determined that no changes are then necessary or desirable. The Commission reserves the right to require any modifications to the emergency action plan.

Article 36. In the interests of protecting and enhancing the scenic, recreational and other environmental values of the project, the Licensees: (1) shall supervise and control the use and occupancy of project lands and waters; (2) shall prohibit, without further Commission approval, the further use and occupancy of project lands and waters other than as specifically authorized by this license; (3) may authorize without further Commission approval, but subject to the approval of the La Jolla, Rincon, or San Pasqual Bands of Mission Indians and the Secretary of the Interior to the extent their approval is required by law, the use and occupancy of project lands and waters for landscape plantings and the construction, operation, and maintenance of access roads, power and telephone distribution lines, piers, landings, boat

docks, or similar structures and facilities, and embankments, bulkheads, retaining walls, or other similar structures for erosion control to protect the existing shoreline; (4) shall require, where feasible and desirable, the multiple use and occupancy of facilities for access to project lands and waters; and (5) shall ensure to the satisfaction of the Commission's authorized representative that all authorized uses and occupancies of project lands and waters (a) are consistent with shoreline aesthetic values, (b) are maintained in a good state of repair, and (c) comply with State and local health regulations. Under item (3) of this article, the Licensees may, among other things, institute a program for issuing permits to a reasonable extent for the authorized types of use and occupancy of project lands and waters. Under appropriate circumstances, permits may be subject to the payment of a fee in a reasonable amount. Before authorizing the construction of bulkheads or retaining walls, the Licensees shall: (a) inspect the site of the proposed construction, (b) determine that the proposed construction is needed, and (c) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site. If an authorized use or occupancy fails to comply with the conditions of this article or with any reasonable conditions imposed by the Licensees for the protection of the environmental quality of project lands and waters, the Licensees shall take appropriate action to correct the violations, including, if necessary, cancellation of the authorization and removal of any non-complying structures or facilities. The Licensees' consent to an authorized use or occupancy of project lands and waters shall not, without their express agreement, place upon the Licensees any obligation to construct or maintain any associated facilities. Within one year from the effective date of this license, the Licensees shall furnish a copy of their guidelines and procedures used to implement the pro-

visions of this article to the Commission's authorized representative and its Director, Office of Electric Power Regulation. Whenever the Licensees make any modification to these guidelines and procedures, they shall promptly furnish a copy to each of those persons. The Commission reserves the right to require modifications to these guidelines and procedures.

Article 37. Prior to the commencement of any construction or development of any project works or other facilities at the project, the Licensees shall consult and cooperate with the State Historic Preservation Officer (SHPO) to determine the need for, and extent of, any archeological or historic resource surveys and any mitigative measures that may be necessary. The Licensees shall provide funds in a reasonable amount for such activity. If any previously unrecorded archeological or historic sites are discovered during the course of construction, construction activity in the vicinity shall be halted, a qualified archeologist shall be consulted to determine the significance of the sites, and the Licensees shall consult with the SHPO to develop a mitigation plan for the protection of significant archeological or historic resources. If the Licensees and the SHPO cannot agree on the amount of money to be expended on archeological work, the Commission reserves the right to require the Licensees to conduct, at their own expense, any such work found necessary.

Article 38. The Licensees shall, to the satisfaction of the Commission's authorized representative, install and operate any signs, lights, sirens, or other safety devices that may be needed to warn the public of fluctuations in flow from the project and protect the public in its recreational use of project lands and waters.

Article 39. The Licensees shall file with the Commission's Regional Engineer in San Francisco, California, and

the Director, Office of Electric Power Regulation, one copy each of the contract drawings and specifications prior to the start of reconstruction of Henshaw Dam. The Director, Office of Electric Power Regulation, may require changes in the plans and specifications so as to assure a safe and adequate dam.

Article 40. The Licensees shall retain a Board of two or more qualified, independent engineering consultants to review the design, specifications, and reconstruction of Henshaw Dam for safety and adequacy. The names and qualifications of the Board members shall be submitted to the Director, Office of Electric Power Regulation, for approval. Among other things, the Board shall assess the geology of the project site and surroundings; the design, specifications and construction of the dam, spillway and equipment involved in water control and emergency power supply; the filling schedule for the reservoir, the construction inspection program; and construction procedures and progress. The Licensees shall submit to the Commission copies of the Board's report on each meeting. Reports reviewing the design, specifications, and construction of Henshaw Dam shall be submitted prior to or simultaneously with the submission of the corresponding Exhibit L final design drawings. The Licensees shall also submit a final report of the Board upon completion of the project. The final report shall contain a statement indicating the Board's satisfaction with the construction, safety, and adequacy of the project structures.

(B-4) Except insofar as the exhibits designated and described in Ordering Paragraph (B-2) fail to reflect the inclusion within Project No. 176 of Henshaw Dam and Lake Henshaw, together with the related lands, facilities and water rights, which omissions are to be remedied as required by Article 27, they are approved and made a part of the license.

(B-5) Pursuant to Section 10(i) of the Federal Power Act, the terms and conditions contained in the following sections of Part I of the Act are waived as being in the public interest: 4(e), insofar as it relates to approval of plans by the Chief of Engineers and the Secretary of the Army; 6, insofar as it relates to public notice and to the acceptance and expression in the license of terms and conditions of the Act that are waived in this license; 10(c), insofar as it relates to depreciation reserves; 10(d); 10(f); 11; 12; 19 and 20.

(B-6) This Ordering Paragraph (B) shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313(a) of the Act, and failure of the Licensees to file such an application shall constitute acceptance of this license for Project No. 176. In acknowledgment of this acceptance of the license and its terms and conditions, the license shall be signed for the Licensees and returned to the Commission within 60 days from the date of issuance of this Opinion and order.

(C) With respect to the license for Project No. 559, and subject to a possible mandatory stay of the effective date of the license for Project No. 176 as provided in Section 14(b) of the Federal Power Act (Act) and § 16.10 of the Commission's regulations under the Act:

(C-1) This new license is issued to San Diego Gas & Electric Company (License) pursuant to Part I of the Act, for a period effective the first day of the month in which this license is issued, and terminating on the same day as the new license issued concurrently for Project No. 176, for the continued operation and maintenance of transmission line Project No. 559 occupying lands of the United States within the Rincon Indian Reservation in San Diego County, California, subject to the terms and conditions of the Act, insofar as not expressly waived herein, which Act is incorporated by reference as part of this license, and subject

to the regulations the Commission issues under the provisions of the Act.

(C-2) Project No. 559 consists of:

(i) All lands, the use and occupancy of which are necessary or appropriate for the purposes of the project, constituting the project area and enclosed by the project boundary, which area consists of the 40-foot wide right-of-way beginning at the boundary of Project No. 176 enclosing the power house within the Rincon Indian Reservation, and extending approximately 2.4 miles in a northerly direction to the common boundary of the Rincon Indian Reservation and the Licensee's Rincon Substation, which right-of-way is occupied by a 12 kV primary transmission line and in major part by a 69 kV transmission line connecting the Licensee's Escondido and Rincon Substations.

(ii) All project works comprising a 12 kV wood pole transmission line, including all of the structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, including such portable property as may be used or useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as part of the project is approved or acquiesced in by the Commission; also, all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance or operation of the project.

(C-3) This license is also subject to the terms and conditions set forth in Form L-20 (as revised October 1975) entitled "Terms and Conditions of License for Constructed Transmission Line Project," which terms and conditions designated as Articles 1 through 15 are attached to and made a part of this license, except that Article 9 is modified to

read as follows,

Article 9. The Licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, crops, lands, or other property of the United States including non-allotted tribal lands of the Rincon Indian Reservation (which are held in trust by the United States) occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under this license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

and subject to the following special conditions which are set forth as additional articles:

Article 16. The Licensee shall not preclude residents of the Rincon Indian Reservation from using, occupying and enjoying tribal lands within the right-of-way herein licensed to the extent that such tribal lands are not physically occupied by project works; provided, that neither the Rincon Band of Mission Indians nor any residents of the Rincon Indian Reservation shall erect permanent structures or otherwise use, occupy and enjoy the said tribal lands in a manner which would interfere or be inconsistent with the Licensee's use, occupancy and enjoyment of the said tribal lands under this license, including obstruction of the Licensee's access to project works.

Article 17. The Licensee shall pay to the United States the following annual charges, effective as of the first day of the month in which this license is issued:

(i) For the purpose of reimbursing the United States for the cost of administration of Part I of the Federal Power Act, a reasonable annual charge as determined by the Com-

mission from time to time in accordance with its regulations. The minimum administrative charge (which is currently \$5.00 per annum) shall be applicable.

(ii) For the purpose of recompensing the United States for the use, occupancy and enjoyment of the tribal lands embraced within the Rincon Indian Reservation, a reasonable annual charge determined by the Commission from time to time in accordance with its regulations for recompensing the United States for the use, occupancy and enjoyment of its lands other than tribal lands embraced within Indian reservations.

Article 18. Prior to the commencement of any construction or development of any project works or other facilities at the project, the Licensee shall consult and cooperate with the State Historic Preservation Officer (SHPO) to determine the need for, and extent of, any archeological or historic resource surveys and any mitigative measures that may be necessary. The Licensee shall provide funds in a reasonable amount for such activity. If any previously unrecorded archeological or historic sites are discovered during the course of construction, construction activity in the vicinity shall be halted, a qualified archeologist shall be consulted to determine the significance of the sites, and the Licensee shall consult with the SHPO to develop a mitigation plan for the protection of significant archeological or historic resources. If the Licensee and the SHPO cannot agree on the amount of money to be expended on archeological work, the Commission reserves the right to require the Licensee to conduct, at its own expense, any such work found necessary.

(C-4) Exhibits J, K and M filed with the application for a new license are hereby approved, but only to the extent that they show the general location of the project transmission line. The Licensee shall file within six months of the issuance of this new license revised Exhibits J, K and M

which shall depict the actual transmission line including the boundaries of the right-of-way herein licensed.

(C-5) Pursuant to Section 10(i) of the Federal Power Act, the terms and conditions contained in the following sections of Part I of the Act are waived as being in the public interest: 4(e), insofar as it relates to approval of plans by the Chief of Engineers and the Secretary of the Army; 6, insofar as it relates to public notice and to the acceptance and expression in the license of terms and conditions of the Act that are waived in this license; 10(c), insofar as it relates to depreciation reserves; 10(d); 10(f); 11; 12; 19 and 20.

(C-6) This Ordering Paragraph (C) shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313(a) of the Act, and failure of the Licensee to file such an application shall constitute acceptance of this license for Project No. 559. In acknowledgment of this acceptance of the license and its terms and conditions, the license shall be signed for the Licensee and returned to the Commission within 60 days from the date of issuance of this Opinion and order.

(D) Article 19 of the license for Project No. 176 issued to Escondido Mutual Water Company on June 25, 1924, as amended, is hereby amended as of September 23, 1969, with respect to the tribal lands of the La Jolla and Rincon Bands of Mission Indians, and as of May 26, 1970, with respect to the tribal lands of the San Pasqual Band of Mission Indians, as follows:

(D-1) Paragraph (b) of Article 19 is deleted.

(D-2) Paragraph (c) of Article 19 is redesignated as paragraph (b) and amended to read as follows:

For the purpose of recompensing the United States for the use, occupancy and enjoyment of the tribal lands embraced within the Rincon and San Pasqual Indian Reser-

vations comprising the right-of-way for the former Rincon-Bear Valley transmission line, a reasonable annual charge of \$8.00 per mile until the date of restoration of the lands authorized by the license to be used for the line, which annual charge shall be placed to the credit of the Rincon and San Pasqual Bands of Mission Indians, respectively, in proportion to the acreage occupied within their respective reservations by the right-of-way for the line.

(D-3) Paragraph (d) of Article 19 is redesignated as paragraph (c) and amended to read as follows:

For the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands, including the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, other than the tribal lands within the Rincon Indian Reservation which are used and occupied for the generation of electric power, and other than the tribal lands within the Rincon and San Pasqual Indian Reservations comprising the right-of-way for the former Rincon-Bear Valley transmission line, a reasonable annual charge determined by multiplying fifty per cent of the Net Water Benefit of Project No. 176, by a percentage which shall be determined by dividing the aggregate distance in feet traversed by the Escondido Canal through the lands of the United States including the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, by the sum of (i) the total distance in feet traversed by the Escondido Canal from Station 1 through Station 302A, inclusive, and (ii) distance in feet traversed from Station 302A to Station 303 of the Escondido Canal and through a 36-inch diameter concrete pipe; an additional conduit; a 320-foot long, 42-inch diameter concrete pipe; Escondido Creek and Lake Wohlford to the outlet tower, and through the 4,195-foot long outlet pipe and penstock.

For the purpose of this paragraph (c): The Term "Net Canal Water" is defined as the volume of water which leaves the Escondido Canal during a calendar year. The term "Cost of Canal Water" is defined as the cost to the Licensee and Vista Irrigation District of operating the water supply facilities of Project No. 176 and the Henshaw development during a calendar year, multiplied by 4,143 acre-feet, and divided by the number of acre-feet comprising the Net Canal Water during the same calendar year. The term "Cost of Alternative Water" is defined as the computed cost to the Licensee of obtaining 4,143 acre-feet of water for a calendar year from the least expensive source, as weighted for the Licensee's percentage domestic-agricultural distribution pattern for the same calendar year. And the term "Net Water Benefit" is defined as the difference between the Cost of Alternative Water and the lower Cost of Canal Water for a calendar year.

The said annual charges in this paragraph (c) for the use, occupancy and enjoyment of lands of the United States, including tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, shall be placed to the credit of the United States and the La Jolla, Rincon and San Pasqual Bands of Mission Indians, respectively, in proportion to the respective distances traversed by the said conduit through their respective lands.

(D-4) A new paragraph (d) is added to Article 19, as follows:

For the purpose of recompensing the United States for the use, occupancy, and enjoyment of the tribal lands embraced within the Rincon Indian Reservation which are used and occupied for the generation of electric power, a reasonable annual charge equal to fifty per cent of the Net Rincon Power Benefit of Project No. 176.

For the purpose of this paragraph (d): The term "Cost of Rincon Power" is defined as the cost to the Licensee of operating and maintaining the Rincon power facilities (including property taxes and amortization attributable thereto), and all demand, energy and other charges incurred for power purchased and resold to the Rincon Band of Mission Indians, during a calendar year. The term "Rincon Power Revenues" is defined as the sum of all demand, energy and other charges invoiced for power generated by the Rincon power facilities, and for power purchased and resold to the Rincon Band of Mission Indians, during the same calendar year. And the term "Net Rincon Power Benefit" is defined as the difference between the Rincon Power Revenues and the lower Cost of Rincon Power for a calendar year.

The said annual charges in this paragraph (d) for the use, occupancy and enjoyment of tribal lands embraced within the Rincon Indian Reservation shall be placed to the credit of the Rincon Band of Mission Indians.

(D-5) A new paragraph (e) is added to Article 19, as follows:

The Licensee shall file with the Commission and serve upon designees of the La Jolla, Rincon and San Pasqual Bands of Mission Indians and the Department of the Interior, on or before February 1 of each year, a statement under oath showing all of the information which is necessary or useful for the computation and crediting of annual charges as provided in this Article 19, together with its computations. The La Jolla, Rincon and San Pasqual Bands of Mission Indians and the Department of the Interior may file with the Commission and transmit to the Licensee and the others mentioned in this paragraph, on or before March 1 of each year, a statement under oath in opposition to the said information and computations. Such statements shall be considered and acted upon by the Commission officer

who is then performing the functions which are performed at the time of this amendment by the Director of the Division of Licensed Projects, Office of Electric Power Regulation, or that officer's Deputy, to whom authority to act is hereby delegated.

The initial filing under this paragraph (e) covering all past periods shall be made within 90 days after the date of this amendment, and the initial filing in opposition, if any, shall be made within 120 days after the date of this amendment.

(D-6) A new paragraph (f) is added to Article 19, as follows:

The Licensee shall pay interest on the annual charges applicable to the tribal lands of the La Jolla, Rincon and San Pasqual Bands of Mission Indians (in excess of the amounts previously paid in the case of the San Pasqual Band) at the rate of 7% per annum on amounts payable prior to October 10, 1974; at the rate of 9% per annum on amounts accruing on and after October 10, 1974, on amounts payable prior to that date; and at the rate of 9% per annum on amounts payable on and after October 10, 1974, to the date(s) of payment.

(E) Pending further order of the Commission, Vista Irrigation District shall not modify or cause or permit others to modify Henshaw Dam, or any part of Henshaw Dam or any work appurtenant or accessory thereto, including without limitation Lake Henshaw and the Warner Ranch well field, or construct or cause or permit others to construct any works or structures used and useful in conjunction with the unit of development known as the Henshaw development, or any part thereof. Nonetheless, Vista Irrigation District may drill wells or cause or permit others to drill wells into Warner Ranch solely for the purpose of replacing deteriorating water wells, and shall operate and maintain all water

wells in the Warner Ranch well field in such a manner as to extract volumes and flows of water which shall not exceed the average volumes and flows extracted therefrom during the preceding five calendar years.

(F) Commencing concurrently with any stay of the effective date of Ordering Paragraph (B) of this Opinion and order issuing a license for Project No. 176, and until that license is effective or pending a further order of the Commission, whichever shall occur first, Escondido Mutual Water Company and Vista Irrigation District shall permit diversions of water from the Escondido Canal in such volumes and flows as are authorized in writing by the Commission and can be and are in fact utilized for domestic, agricultural, stockwatering and/or small commercial consumption within the "Indian Service Area" defined in Article 29 of that license, and at such times as, and to the extent that, sufficient volumes and flows are available in the said conduit, and shall otherwise operate Project No. 176 in the manner contemplated by Article 29. The Director, Division of Licensed Projects, Office of Electric Power Regulation, or his Deputy, and their successors, are hereby delegated authority to act on diversion requests pursuant to this Ordering Paragraph (F).

(G) In the event of any stay of the effective date of Ordering Paragraph (B) of this Opinion and order issuing a license for Project No. 176, Escondido Mutual Water Company and Vista Irrigation District shall, no later than three months from the date of issuance of this Opinion and order, file with the Commission and implement an emergency action plan to provide early warning as specified in Article 35 of that license, which article is incorporated into this Ordering Paragraph (G) by reference, and shall otherwise comply with Article 35 until that license is effective.

(H) The motion filed on June 30, 1977, by Pacific Gas and Electric Company, for leave to file an *amicus curiae* brief on exceptions, is granted.

(I) The motions requesting oral argument filed on September 6, 1977, by Escondido Mutual Water Company, the City of Escondido, California, and Vista Irrigation District, and by the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians and the Secretary of the Interior, are denied.

(j) The motion filed on January 9, 1978, by the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians is granted insofar as it requests permission to lodge a copy of the initial decision issued December 14, 1977, in *Northern States Power Company*, Project No. 108, and is denied insofar as it requests leave to file the supplemental brief attached thereto.

By the Commission. Commissioner Holden voted present.

(S E A L)

Lois D. Cashell,
Acting Secretary.

IN TESTIMONY of its acknowledgment of acceptance of all of the provisions, terms and conditions of this license, The Escondido Mutual Water Company this ____ day of _____, 1979, has caused its corporate name to be signed hereto by _____, its _____ President, and its corporate Seal to be affixed hereto and attested by _____, its _____ Secretary, pursuant to resolution of its Board of Directors duly adopted on the ____ day _____, 1979, a certified copy of the record of which is attached hereto.

ESCONDIDO MUTUAL WATER COMPANY

By _____
President

Attest:

Secretary

(Executed in quadruplicate)

IN TESTIMONY of its acknowledgement of acceptance of all of the provisions, terms and conditions of this license, The City of Escondido, California, this _____ day of _____, 1979, has caused its State of California general law city name to be signed hereto by _____, its Mayor, and its official Seal to be affixed hereto and attested by _____, its City Clerk, pursuant to a resolution of its City Council duly adopted on the ____ day of _____, 1979, a certified copy of the record of which is attached hereto.

CITY OF ESCONDIDO, CALIFORNIA

By _____
Mayor

Attest:

City Clerk
(Executed in quadruplicate)

IN TESTIMONY of its acknowledgement of acceptance of all of the provisions, terms and conditions of this license, The Vista Irrigation District this ____ day of _____, 1979, has caused its State of California water code name to be signed hereto by _____, its _____, and its official Seal to be affixed hereto and attested by _____, its _____, pursuant to a resolution of its _____ duly adopted on the _____ day _____, 1979, a certified copy of the record of which is attached hereto.

VISTA IRRIGATION DISTRICT

By _____
(Title)

Attest:

(Title)
(Executed in quadruplicate)

IN TESTIMONY of its acknowledgement of acceptance of all of the provisions, terms and conditions of this license, The San Diego Gas & Electric Company this ____ day of _____, 1979, has caused its corporate name to be signed hereto by _____, its _____ President, and its corporate Seal to be affixed hereto and attested by _____, its _____ Secretary, pursuant to a resolution of its Board of Directors duly adopted on the ____ day of _____, 1979, a certified copy of the record of which is attached hereto.

SAN DIEGO GAS & ELECTRIC
COMPANY

By _____
President

Attest:

Secretary
(Executed in quadruplicate)

Form L-16
(October, 1975)

FEDERAL ENERGY REGULATORY COMMISSION
TERMS AND CONDITIONS OF LICENSE FOR
CONSTRUCTED MINOR PROJECT AFFECTING
LANDS OF THE UNITED STATES

Article 1. The entire project, as described in this order of the Commission, shall be subject to all of the provisions, terms, and conditions of the license.

Article 2. No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as a part of the license until such change shall have been approved by the Commission: *Provided, however,* That if the Licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval a revised, or additional exhibit or exhibits covering the proposed changes which, upon approval by the Commission, shall become a part of the license and shall supersede, in whole or in part, such exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

Article 3. The project area and project works shall be in substantial conformity with the approved exhibits referred to in Article 2 herein or as changed in accordance with the provisions of said article. Except when emergency shall require for the protection of navigation, life, health, or property, there shall not be made without prior approval of the Commission any substantial alteration or addition not in conformity with the approved plans to any dam or other project works under the license or any substantial use of project lands and waters not authorized herein; and any

emergency alteration, addition, or use so made shall thereafter be subject to such modification and change as the Commission may direct. Minor changes in project works, or in uses of project lands and waters, or divergence from such approved exhibits may be made if such changes will not result in a decrease in efficiency, in a material increase in cost, in an adverse environmental impact, or in impairment of the general scheme of development; but any of such minor changes made without the prior approval of the Commission, which in its judgment have produced or will produce any of such results, shall be subject to such alteration as the Commission may direct.

Article 4. The project, including its operation and maintenance and any work incidental to additions or alterations authorized by the Commission, whether or not conducted upon lands of the United States, shall be subject to the inspection and supervision of the Regional Engineer, Federal Energy Regulatory Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall cooperate fully with said representative and shall furnish him such information as he may require concerning the operation and maintenance of the project, and any such alterations thereto, and shall notify him of the date upon which work with respect to any alteration will begin, as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The Licensee shall submit to said representative a detailed program of inspection by the Licensee that will provide for an adequate and qualified inspection force for construction of any such alterations to the project. Construction of said alterations or

any feature thereof shall not be initiated until the program of inspection for the alterations or any feature thereof has been approved by said representative. The Licensee shall allow said representative and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties. The Licensee shall comply with such rules and regulations of general or special applicability as the Commission may prescribe from time to time for the protection of life, health, or property.

Article 5. The Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project. The Licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the Licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. The provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear; and mortgage or trust deeds or judicial sales made thereunder, or tax sales, shall not be deemed

voluntary transfers within the meaning of this article.

Article 6. The Licensee shall install and thereafter maintain gages and stream-gaging stations for the purpose of determining the stage and flow of the stream or streams on which the project is located, the amount of water held in and withdrawn from storage, and the effective head on the turbines; shall provide for the required reading of such gages and for the adequate rating of such stations; and shall install and maintain standard meters adequate for the determination of the amount of electric energy generated by the project works. The number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, shall at all times be satisfactory to the Commission or its authorized representative. The Commission reserves the right, after notice and opportunity for hearing, to require such alterations in the number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, as are necessary to secure adequate determinations. The installation of gages, the rating of said stream or streams, and the determination of the flow thereof, shall be under the supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region of the project, and the Licensee shall advance to the United States Geological Survey the amount of funds estimated to be necessary for such supervision, or cooperation for such periods as may be mutually agreed upon. The Licensee shall keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Commission, and shall make return of such records annually at such time and in such form as the Commission may prescribe.

Article 7. The Licensee shall, after notice and opportunity for hearing, install additional capacity or make other

changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to do so.

Article 8. The Licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other projects or power systems and in such manner as the Commission may direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the Licensee as the Commission may order.

Article 9. The operations of the Licensee, so far as they affect the use, storage and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes, and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Commission may prescribe for the purposes hereinbefore mentioned.

Article 10. On the application of any person, association, corporation, Federal agency, State or municipality, the Licensee shall permit such reasonable use of its reservoir or other project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission, after notice and opportunity for hearing, in the interests of comprehensive development of the waterway or waterways involved and the conservation and utilization of the water resources of the region for water supply or for the purposes of steam-electric, irrigation, industrial, municipal or similar uses. The Licensee shall receive reasonable com-

pensation for use of its reservoir or other project properties or parts thereof for such purposes, to include at least full reimbursement for any damages or expenses which the joint use causes the Licensee to incur. Any such compensation shall be fixed by the Commission either by approval of an agreement between the Licensee and the party or parties benefiting or after notice and opportunity for hearing. Applications shall contain information in sufficient detail to afford a full understanding of the proposed use, including satisfactory evidence that the applicant possesses necessary water rights pursuant to applicable State law, or a showing of cause why such evidence cannot concurrently be submitted, and a statement as to the relationship of the proposed use to any State or municipal plans or orders which may have been adopted with respect to the use of such waters.

Article 11. The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing.

Article 12. Whenever the United States shall desire, in connection with the project, to construct fish and wildlife facilities or to improve the existing fish and wildlife facilities at its own expense, the Licensee shall permit the United States or its designated agency to use, free of cost, such of the Licensee's lands and interests in lands, reservoirs, waterways and project works as may be reasonably required to complete such facilities or such improvements thereof. In addition, after notice and opportunity for hearing, the Li-

censee shall modify the project operation as may be reasonably prescribed by the Commission in order to permit the maintenance and operation of the fish and wildlife facilities constructed or improved by the United States under the provisions of this article. This article shall not be interpreted to place any obligation on the United States to construct or improve fish and wildlife facilities or to relieve the Licensee of any obligation under this license.

Article 13. So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes, including fishing and hunting: *Provided*, That the Licensee may reserve from public access such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property.

Article 14. In the construction, maintenance, or operation of the project, the Licensee shall be responsible for, and shall take reasonable measures to prevent, soil erosion on lands adjacent to streams or other waters, stream sedimentation, and any form of water or air pollution. The Commission, upon request or upon its own motion, may order the Licensee to take such measures as the Commission finds to be necessary for these purposes, after notice and opportunity for hearing.

Article 15. The Licensee shall clear and keep clear to an adequate width lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which results from the clearing of lands or from the maintenance or alteration of the project works. In addition, all trees along the periphery of project reservoirs which may

die during operations of the project shall be removed. All clearing of the lands and disposal of the unnecessary material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission and in accordance with appropriate Federal, State, and local statutes and regulations.

Article 16. Timber on lands of the United States cut, used, or destroyed in the construction and maintenance of the project works, or in the clearing of said lands, shall be paid for, and the resulting slash and debris disposed of, in accordance with the requirements of the agency of the United States having jurisdiction over said lands. Payment for merchantable timber shall be at current stumpage rates, and payment for young growth timber below merchantable size shall be at current damage appraisal values. However, the agency of the United States having jurisdiction may sell or dispose of the merchantable timber to others than the Licensee: *Provided*, That timber so sold or disposed of shall be cut and removed from the area prior to, or without undue interference with, clearing operations of the Licensee and in coordination with the Licensee's project construction schedules. Such sale or disposal to others shall not relieve the Licensee of responsibility for the clearing and disposal of all slash and debris from project lands.

Article 17. The Licensee shall do everything reasonably within its power, and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon the request of officers of the agency concerned, to prevent, to make advance preparations for suppression of, and to suppress fires on the lands to be occupied or used under the license. The Licensee shall be liable for and shall pay the costs incurred by the United States in suppressing fires caused from the construction, operation, or maintenance of the

project works or of the works appurtenant or accessory thereto under the license.

Article 18. The Licensee shall interpose no objection to, and shall in no way prevent, the use by the agency of the United States having jurisdiction over the lands of the United States affected, or by persons or corporations occupying lands of the United States under permit, of water for fire suppression from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license, or the use by said parties of water for sanitary and domestic purposes from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license.

Article 19. The Licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, lands, or other property of the United States, occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under the license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

Article 20. The Licensee shall allow any agency of the United States, without charge, to construct or permit to be constructed on, through, and across those project lands which are lands of the United States such conduits, chutes, ditches, railroads, roads, trails, telephone and power lines, and other routes or means of transportation and communication as are not inconsistent with the enjoyment of said lands by the Licensee for the purposes of the license. This license shall not be construed as conferring upon the Licensee any right to use, occupancy, or enjoyment of the lands of the United

States other than for the construction, operation, and maintenance of the project as stated in the license.

Article 21. In the construction and maintenance of the project, the location and standards of roads and trails on lands of the United States and other uses of lands of the United States, including the location and condition of quarries, borrow pits, and spoil disposal areas, shall be subject to the approval of the department or agency of the United States having supervision over the lands involved.

Article 22. The Licensee shall make provision, or shall bear the reasonable cost, as determined by the agency of the United States affected, of making provision for avoiding inductive interference between any project transmission line or other project facility constructed, operated, or maintained under the license, and any radio installation, telephone line, or other communication facility installed or constructed before or after construction of such project transmission line or other project facility and owned, operated, or used by such agency of the United States in administering the lands under its jurisdiction.

Article 23. The Licensee shall make use of the Commission's guidelines and other recognized guidelines for treatment of transmission line rights-of-way, and shall clear such portions of transmission line rights-of-way across lands of the United States as are designated by the officer of the United States in charge of the lands; shall keep the areas so designated clear of new growth, all refuse, and inflammable material to the satisfaction of such officer; shall trim all branches of trees in contact with or liable to contact the transmission lines; shall cut and remove all dead or leaning trees which might fall in contact with the transmission lines; and shall take such other precautions against fire as may be required by such officer. No fires for the burning of waste material shall be set except with the prior written consent

of the officer of the United States in charge of the lands as to time and place.

Article 24. If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address of the Licensee or its agent, the Commission will deem it to be the intent of the Licensee to surrender the license. The Commission, after notice and opportunity for hearing, may require the Licensee to remove any or all structures, equipment and power lines within the project boundary and to take any such other action necessary to restore the project waters, lands, and facilities remaining within the project boundary to a condition satisfactory to the United States agency having jurisdiction over its lands or the Commission's authorized representative, as appropriate, or to provide for the continued operation and maintenance of nonpower facilities and fulfill such other obligations under the license as the Commission may prescribe. In addition, the Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.

Article 25. The right of the Licensee and of its successors and assigns to use or occupy waters over which the United States has jurisdiction, or lands of the United States under the license, for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless the Licensee has obtained a new license pursuant to the then existing laws and regulations, or

an annual license under the terms and conditions of this license.

Article 26. The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.

Form L-20

(October, 1975)

FEDERAL ENERGY REGULATORY COMMISSION
TERMS AND CONDITIONS OF LICENSE FOR
CONSTRUCTED TRANSMISSION LINE PROJECT

Article 1. The entire project, as described in this order of the Commission, shall be subject to all of the provisions, terms, and conditions of the license.

Article 2. No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as a part of the license until such change shall have been approved by the Commission: *Provided, however,* That if the Licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval a revised, or additional exhibit or exhibits covering the proposed changes which, upon approval by the Commission, shall become a part of the license and shall supersede, in whole or in part, such exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

Article 3. The project area and project works shall be in substantial conformity with the approved exhibits referred to in Article 2 herein or as changed in accordance with the provisions of said article. Except when emergency shall require for the protection of navigation, life, health, or property, there shall not be made without prior approval of the Commission any substantial alteration or addition not in conformity with the approved plans to any dam or other project works under the license or any substantial use of project lands and waters not authorized herein; and any emergency alteration, addition, or use so made shall there-

after be subject to such modification and change as the Commission may direct. Minor changes in project works, or in uses of project lands and waters, or divergence from such approved exhibits may be made if such changes will not result in a decrease in efficiency, in a material increase in cost, in an adverse environmental impact, or in impairment of the general scheme of development; but any of such minor changes made without the prior approval of the Commission, which in its judgment have produced or will produce any of such results, shall be subject to such alteration as the Commission may direct.

Article 4. The project, including its operation and maintenance and any work incidental to additions or alterations authorized by the Commission, whether or not conducted upon lands of the United States, shall be subject to the inspection and supervision of the Regional Engineer, Federal Energy Regulatory Commission, in the region wherein the project is located or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall cooperate fully with said representative and shall furnish him such information as he may require concerning the operation and maintenance of the project, and any such alterations thereto, and shall notify him of the date upon which work with respect to any alteration will begin, as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The Licensee shall submit to said representative a detailed program of inspection by the Licensee that will provide for an adequate and qualified inspection force for construction of any such alterations to the project. Construction of said alterations or any feature thereof shall not be initiated until the program

of inspection for the alterations or any feature thereof has been approved by said representative. The Licensee shall allow said representative and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties. The Licensee shall comply with such rules and regulations of general or special applicability as the Commission may prescribe from time to time for the protection of life, health, or property.

Article 5. The Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project. The Licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the Licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. The provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear; and mortgage or trust deeds or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article.

Article 6. In the construction or maintenance of the project works, the Licensee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its transmission lines and telegraph, telephone and other signal wires or power transmission lines constructed prior to its transmission lines and not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling or obstructing traffic or endangering life. None of the provisions of this article are intended to relieve the Licensee from any responsibility or requirement which may be imposed by any other lawful authority for avoiding or eliminating inductive interference.

Article 7. Timber on lands of the United States cut, used, or destroyed in the construction and maintenance of the project works, or in the clearing of said lands, shall be paid for, and the resulting slash and debris disposed of, in accordance with the requirements of the agency of the United States having jurisdiction over said lands. Payment for merchantable timber shall be at current stumpage rates, and payment for young growth timber below merchantable size shall be at current damage appraisal values. However, the agency of the United States having jurisdiction may sell or dispose of the merchantable timber to others than the Licensee: *Provided*, That timber so sold or disposed of shall be cut and removed from the area prior to, or without undue interference with, clearing operations of the Licensee and in coordination with the Licensee's project construction schedules. Such sale or disposal to others shall not relieve the Licensee of responsibility for the clearing and disposal of all slash and debris from project lands.

Article 8. The Licensee shall do everything reasonably within its power, and shall require its employees, contrac-

tors, and employees of contractors to do everything reasonably within their power, both independently and upon the request of officers of the agency concerned, to prevent, to make advance preparations for suppression of, and to suppress fires on the lands to be occupied or used under the license. The Licensee shall be liable for and shall pay the costs incurred by the United States in suppressing fires caused from the construction, operation, or maintenance of the project works or of the works appurtenant or accessory thereto under the license.

Article 9. The Licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, lands, or other property of the United States, occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under the license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

Article 10. The Licensee shall allow any agency of the United States, without charge, to construct or permit to be constructed on, through, and across those project lands which are lands of the United States such conduits, chutes, ditches, railroads, roads, trails, telephone and power lines, and other routes or means of transportation and communication as are not inconsistent with the enjoyment of said lands by the Licensee for the purposes of the license. This license shall not be construed as conferring upon the Licensee any right of use, occupancy, or enjoyment of the lands of the United States other than for the construction, operation, and maintenance of the project as stated in the license.

Article 11. The Licensee shall make provision, or shall bear the reasonable cost, as determined by the agency of

the United States affected, of making provision for avoiding inductive interference between any project transmission line or other project facility constructed, operated, or maintained under the license, and any radio installation, telephone line, or other communication facility installed or constructed before or after construction of such project transmission line or other project facility and owned, operated, or used by such agency of the United States in administering the lands under its jurisdiction.

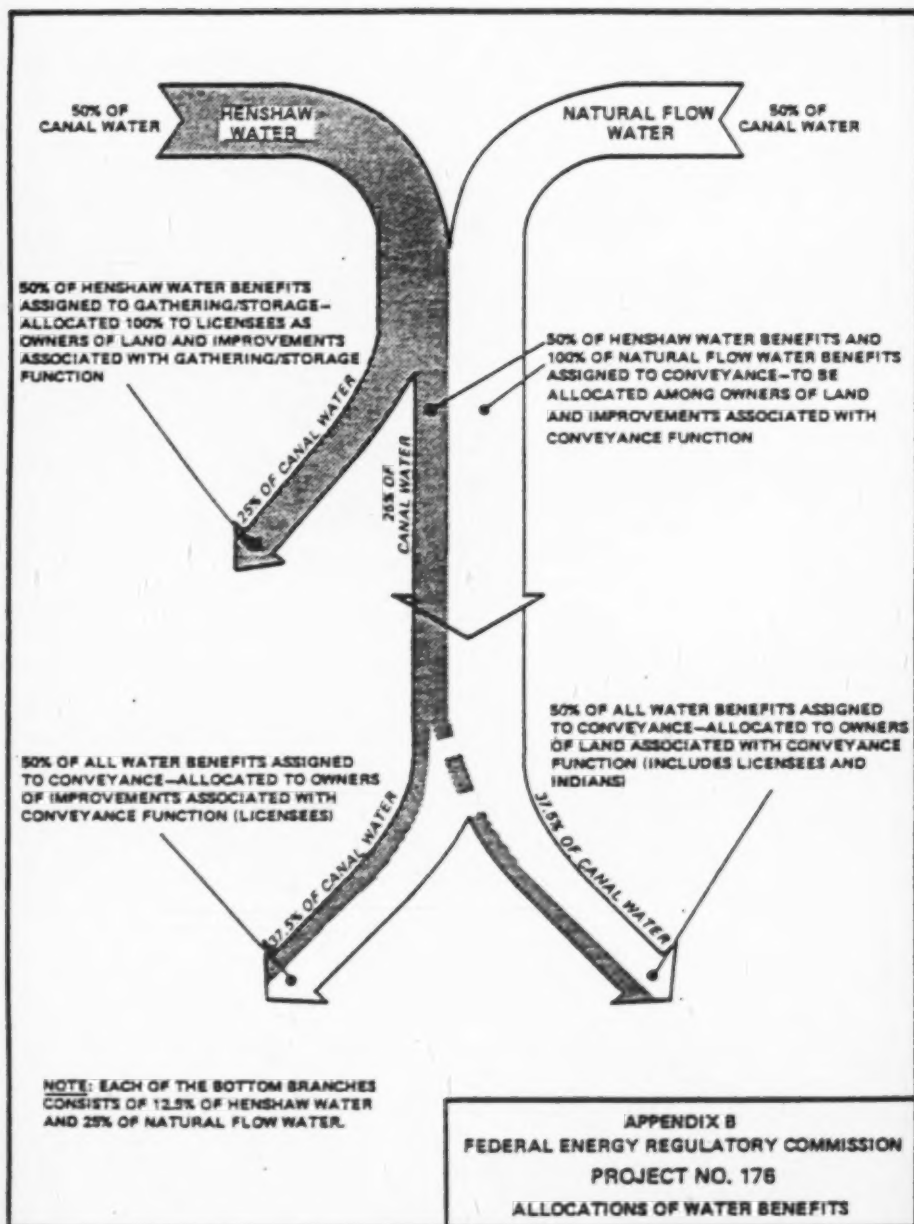
Article 12. The Licensee shall make use of the Commission guidelines and other recognized guidelines for treatment of transmission line rights-of-way, and shall clear such portions of transmission line rights-of-way across lands of the United States as are designated by the officer of the United States in charge of the lands; shall keep the areas so designated clear of new growth, ~~all~~ refuse, and inflammable material to the satisfaction of such officer; shall trim all branches of trees in contact with or liable to contact the transmission lines; shall cut and remove all dead or leaning trees which might fall in contact with the transmission lines; and shall take such other precautions against fire as may be required by such officer. No fires for the burning of waste material shall be set except with the prior written consent of the officer of the United States in charge of the lands as to time and place.

Article 13. If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address of the Licensee or its agent, the Commission will deem it to be the intent of the Licensee to surrender the license. The Commission, after notice and opportunity for

hearing, may require the Licensee to remove any or all structures, equipment and power lines within the project boundary and to take any such other action necessary to restore the project waters, lands, and facilities remaining within the project boundary to a condition satisfactory to the United States agency having jurisdiction over its lands or the Commission's authorized representative, as appropriate, or to provide for the continued operation and maintenance of nonpower facilities and fulfill such other obligations under the license as the Commission may prescribe. In addition, the Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.

Article 14. The right of the Licensee and of its successors and assigns to use or occupy waters over which the United States has jurisdiction, or lands of the United States under the license, for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless the Licensee has obtained a new license pursuant to the then existing laws and regulations, or an annual license under the terms and conditions of this license.

Article 15. The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.



Federal Energy Regulatory Commission

Opinion No. 36-A

Issued November 26, 1979.

Net Investment, Severance Damages, Annual Charges
United States of America Federal Energy Regulatory
Commission.

Before Commissioners: Charles B. Curtis, Chairman;
Georgiana Sheldon, Matthew Holden, Jr., and George R.
Hall.

Escondido Mutual Water Company; City of Escondido,
California; and Vista Irrigation District. Project No. 176;
Docket No. E-7562.

Secretary of the Interior Acting in His Capacity as Trustee
for the Rincon, La Jolla and San Pasqual Bands of Mission
Indians v. Escondido Mutual Water Company and City of
Escondido, California; Vista Irrigation District; San Diego
Gas & Electric Company. Docket No. E-7655; Project No.
559.

OPINION NO. 36-A

**OPINION AND ORDER ON REHEARING
MODIFYING LICENSES AND STAY, DETERMINING
NET INVESTMENT AND SEVERANCE DAMAGES,
AND OTHERWISE DENYING REHEARING**

(Issued November 26, 1979)

AN OVERVIEW

In Opinion No. 36 issued February 26, 1979, the
Commission¹, among other actions, issued new licenses for

¹The term "Commission" refers to the Federal Power Commission
in contexts prior to October 1, 1977, and to the Federal Energy Reg-
ulatory Commission in contexts on and after that date.

Project Nos. 176 and 559², amended a 1924 license for Project No. 176, and ordered Mutual and Vista to permit diversions of water from a conduit known as the Escondido Canal to portions of three Indian reservations designated as an Indian Service Area. On March 28, 1979, petitions for rehearing of that opinion and motions for a stay were filed by the Licensees, the Bands³ and the Secretary of the Interior (Interior). On the same day, a motion to reopen the record and for other purposes was filed jointly by the Bands and Interior. On April 12, 1979, the Bands filed a response to the Licensees' motion for a stay. On the same day, the Licensees filed an opposition to the Bands' and Interior's motions for a stay and to reopen the record, which opposition was supported by Interior on April 16, 1979.

On April 27, 1979, the Commission granted rehearing for further consideration; stayed Ordering Paragraphs (B) and (C) issuing the two licenses, Ordering Paragraph (D) amending the 1924 license and Ordering Paragraph (F) providing water for the Indian Service Area in the event of a stay of Ordering Paragraph (B); and authorized the filing of responses to the respective petitions for rehearing. Today, upon consideration of the petitions for rehearing and the other filings of the parties, including their responses to the petitions,⁴ we are modifying the old and new licenses for Project No. 176, together with the new license for Project No. 559, and clarifying some of the provisions in the light

²To Escondido Mutual Water Company (Mutual), the City of Escondido, California (Escondido), and Vista Irrigation District (Vista) (collectively, the Licensees), in the case of Project No. 176, and to San Diego Gas & Electric Company (SDG&E) in the case of Project No. 559.

³The La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians.

⁴Although we are addressing only some of the matters raised, we have considered all of the arguments.

of the questions that have been asked. We are also vacating the stay of April 27, 1979, which was imposed to preserve the *status quo* pending rehearing of Opinion No. 36, and implementing a two-year stay of the effective date of Ordering Paragraph (B) of Opinion No. 36 mandated by Section 14(b) of the Federal Power Act.⁵

NET INVESTMENT AND SEVERANCE DAMAGES⁶

Generally

The Bands' and Interior's petitions for rehearing contend that we erred, among other reasons, for failing to determine net investment and severance damages. Opinion No. 36 explains, however, at page 77,

Since the Commission is not either issuing a license to the Bands or joining Interior in recommending take-over, such a determination need not be made if Interior changes its position upon consideration of this Opinion and order and chooses not to move for a stay pursuant to 18 CFR § 6.10 [sic., § 16.10]. We will, therefore,

⁵Section 14(b) provides, in pertinent part,

... In any relicensing proceeding before the Commission any Federal department or agency may timely recommend ... that the United States exercise its right to take over any project or projects. Thereafter, the Commission, if it does not itself recommend such action ... shall upon motion of such department or agency stay the effective date of any order issuing a license ... for two years after the date of issuance of such order. ...

Since the two-year period from the issuance of an order issuing a license specified in Section 14(b) does not take into consideration that we are required by Section 313(a) to consider applications for rehearing of orders issuing licenses, we are treating that two-year period as running from the date of our action on rehearing, to carry out the intent of Section 14(b) of giving Congress two full years to consider whether or not the United States should take over a project.

⁶On May 21, 1979, the Bands filed a motion to strike the portion of Mutual's, Escondido's and Vista's response to the petitions for rehearing that addresses net investment and severance damages, contending that those matters exceed the scope of the petitions. While the Bands are technically correct, we will deny their motion since we have considered the similar arguments in the briefs to the administrative law judge.

defer making such a determination until one is required. Among other reasons for requesting a stay, Interior said that it was "not in a position to make a clear recommendation to the Congress until such time as these potential costs are determined by the Commission", and

In the alternative, if the foregoing request of the Secretary of the Interior is denied, then the Secretary invokes Section 14(b) of the Federal Power Act and moves to stay the effective date of the Commission's orders issuing the license to the Vista Irrigation District, the Escondido Mutual Water Company and the City of Escondido in Project No. 176 for two years after the date of issuance.

Since we are vacating the stay of April 27, 1979, and Interior has not changed its position, a determination of net investment and severance damages is now required.

Section 14(a) of the Federal Power Act provides, in this connection,

Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license . . . upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent [for its usefulness upon the continuance of the license] but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such

severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.⁷

Net Investment

Section 3(13) of the Federal Power Act defines the term "net investment" in a project as meaning

the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission", plus similar cost of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto,

⁷As discussed in Opinion No. 36 at 51 (Footnote 77) and 74 through 78, the Act of August 15, 1953, provides that Section 14 is not applicable to projects owned by States or municipalities, and we have interpreted that to mean interests owned by States or municipalities. Therefore, if the United States takes over the works of Project No. 176 that are subject to the 1924 license, as amended, it must pay just compensation for the minor interests owned by Vista, and it may pay either (a) net investment plus severance damages, or (b) just compensation if Congress specially so provides, for the interests owned by Mutual. Furthermore, if the United States acquires the Henshaw development it must pay just compensation to Vista whether or not the Henshaw development was licensed as part of Project No. 176 in 1924, in view of the Act of August 15, 1953, and the Fifth Amendment to the Constitution.

if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission.

A determination of the "net investment" of a project under that definition begins with a determination of the "actual legitimate original cost" of that project, which is the cost to the first purchaser making public use of the facility. The parties agree that the actual legitimate original cost of Project No. 176, plus the similar cost of additions thereto and betterments thereof, was \$869,494 as of June 24, 1974, the date on which Mutual's 1924 license expired.* That amount represents the difference between the total plant in service (\$1,294,558), and the contributions by Vista and its predecessor, San Diego County Water Company

*Since Section 14(a) speaks of the payment of the net investment of the licensee "in the project or projects taken," another determination of net investment appears to be required shortly before and as of the time of taking possession, to determine any changes in net investment between the expiration date of the license and the takeover date.

(\$425,064).⁹

After the sum of the actual legitimate original cost and the similar cost of additions and betterments is determined, three items are deducted¹⁰ "if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment". Mutual, Escondido and Vista contend that the "fair return" on Mutual's investment should be determined in accordance with Article 20 of Mutual's 1924 license (which article is mandated by Section 10(d) of the Federal Power Act, *infra*), that Mutual's "earnings" have been less than a "fair return" as so determined and, consequently, that the three items should not be deducted from the sum of the foregoing costs, resulting in a "net investment" of \$869,494. The Commission staff, Interior and the Bands contend, on the other hand, that the accumulated depreciation constitutes "earnings in excess of a fair return", that the amount of the depreciation should therefore be deducted from the sum of the foregoing costs, and that the resulting "net investment" is zero since the amounts of the investment and depreciation are equal.

Today, we regard depreciation as a non-cash expense which contributes to the cash flow of an enterprise and can

⁹Mutual's actual legitimate original cost was first determined by the Commission on August 2, 1949. 8 FPC 1047. A subsequent audit and exhibits in this proceeding made adjustments for additions and betterments and projected the amount to the end of the 1924 license. The amounts of the contributions by Vista and its predecessor are deducted from the amount of the plant in service because Section 3(13) provides, "The term 'cost' . . . shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others. . . ."

¹⁰(a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created.

be utilized for business purposes or distributed to the owners of the business. Depreciation is shown on a balance sheet as an offset to the assets of the business. But the definition of "net investment" in Section 3(13) incorporates concepts that were embodied within the 1914 system of accounts of the Interstate Commerce Commission, which concepts have long since been abandoned. Depreciation was then regarded as a charge against earnings which had to be set aside in a fund or funds for the eventual replacement of the depreciated assets. And it was shown on a balance sheet as a liability.

During the hearings and debates on the Federal Water Power Act, Congress was confronted with the interacting problems of (1) protecting the public against excessive profits by licensees who would utilize the lands and waters of the United States to generate electric power, and (2) allowing sufficient profits to provide incentives for constructing and financing water power projects. Congress chose to leave the regulation of electric rates to the States and, therefore, approached both problems through the regulation of profits. That regulation was embodied in the "net investment" concept which, in its simplest terms, would assure a return of investment through profits to the extent earned, and through a payment at or after the end of the term of the license to the extent that the investment was not previously recovered through profits. "After long negotiation and many conferences, representatives of the largest operating companies and of the leading investment bankers have agreed that the cost basis as above stated will be satisfactory from an investment standpoint, that money for development can be secured, if such basis is expressed in definite language in the bill." O.C. Merrill's Memorandum to the Secretary, 42

FPC, at 345.¹¹

As explained by the Commission, 40 FPC, at 941,

[T]he rather complex formula of Section 3(13) was primarily intended to assure that a licensee whose project was taken over, by the United States or by a new licensee, would recover, either through project revenues during the term of its license or through a payment of a "net investment" charge upon recapture, the original cost of the project, plus a fair return on such investment, if earned, and that with certain limitations, all amounts earned by the project in excess of such a fair return would go to reduce net investment.¹²

On January 20, 1966, the Commission initiated a rule-making proceeding to establish a method for determining the net investment in a project. And, in Order No. 370, issued September 27, 1968 (40 FPC 938), a divided Commission prescribed such a rule. However, in Order No. 370-A, issued November 22, 1968 (40 FPC 1351), the Commission granted rehearing for further consideration. And in Order No. 387, issued August 4, 1969 (42 FPC 329), the Commission vacated Order Nos. 370 and 370-A and substituted a statement of policy focusing on Section 10(d) of the Federal Power Act, which was amended, among other

¹¹O.C. Merrill continued, 42 FPC, at 346,

More time has been spent upon the one paragraph defining "net investment" than on all the rest of the bill. This paragraph was recognized as the foundation upon which the whole structure rested. Every word has been examined with the greatest care. It has been passed upon by the best legal, banking and accounting talent that could be secured, and has been accepted as satisfactory and as clearly defining the basis of compensation.

Judging from the legislative history of the Act of August 15, 1953 (Opinion No. 36, at 75 (Footnote 106)), the net investment concept failed to provide sufficient incentives for financing State and municipal water power projects.

¹²Section 15(a) expressly makes the net investment formula applicable, additionally, to the issuance of new licenses to new licensees.

provisions, in 1968.

We are therefore required by Section 14(a) to determine Mutual's net investment in Project No. 176 under outdated accounting principles which are embodied in the Federal Power Act and in the light of the inability of a prior Commission to agree upon a method for determining net investment, and the recommendations of some of those Commissioners that the matter is one for Congress. And we are required to determine these matters under a statutory provision which appears to have been designed for a profit-making entity, rather than a not-for-profit entity, such as Mutual.

While Congress said that the three items should be deducted to the extent they are accumulated from earnings in excess of a fair return on the licensee's investment, it did not specify how to compute "earnings" or how to determine "fair return". Accordingly we believe we have the latitude to choose methods that will produce reasonable results consistent with the dual objectives of Congress in designing Sections 3(13) and 14(a).

In the case of a not-for-profit entity, such as Mutual, we do not ordinarily think in terms of "earnings" since the shareholder-customers of the enterprise are supposed to be assessed amounts which exactly equal the expenses of the enterprise, resulting in neither profit nor loss.¹³ But its shareholder-members who utilize its products would realize benefits measured by the difference between the amounts of their assessments paid to the not-for-profit enterprise, and the amounts they would have to pay to a profit-making entity for the same products. When a not-for-profit entity is operated successfully over a long period of time, as in the case

¹³In practicable application, the assessments paid to the entity would probably be somewhat higher to cover contingencies.

of Mutual, it is reasonable, in our opinion, to treat the continuing benefit of lower product prices as the "fair return" to the shareholder-customers of the enterprise. Numerically, it would be represented by a "fair return" of zero.

If the not-for-profit entity depreciates its assets, it will under current accounting practices produce a cash flow which can be used to reduce the assessments paid by its shareholder-customers. In that case, its shareholder-customers will recover their investments (except for scrap values) over the lives of the assets; depreciation reserves equalling the costs (minus scrap values) of the assets will come into existence, and the "net investment" (cost minus depreciation) will be zero. If, on the other hand, the depreciation is earmarked for a replacement fund, there will be no reduction in the assessment payments of the entity's shareholder-customers. Instead, a replacement fund equal in amount to the depreciation will come into existence, creating a new asset, and the "net investment" (cost plus the replacement fund minus depreciation) will equal the cost, which must be distributed to the shareholder-customers of the entity who would thereby recover their investments.

While today we do not think in terms of the "earnings" of a not-for-profit entity, the 1914 system of accounts of the Interstate Commerce Commission treated depreciation as accumulated from earnings. In this context, if the continuing benefit of the lower product prices of a not-for-profit entity is treated as a zero "fair return" on the investment in that enterprise, and if the depreciation of that entity's assets is treated as accumulated from the "earnings" of that enterprise, then the depreciation would represent "earnings in excess of a fair return" within the purview of Section 3(13) of the Federal Power Act. That is the approach of the staff witness, who attempted to comply with Order No. 387

while carrying out the Congressional objective of assuring the recovery of the investment, to the extent earned, and providing for the recovery of any balance of the investment in the event of takeover or the issuance of a license to a new licensee. We find his approach reasonable and therefore approve it.

Mutual, Escondido and Vista rely on Section 10(d) which provides,

That after the first twenty years of operation [,] out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the *actual, legitimate* [net] investment of a licensee in any project or projects under license [,] the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the [C]ommission, be held until the termination of the license or applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license. [For any new license issued under section 15, the amortization reserves under this subsection shall be maintained on and after the effective date of such new license.]¹⁴

Mutual, Escondido and Vista equate the term "reasonable rate of return" in Section 10(d) to the term "fair return" in Section 3(13). Accordingly, they applied the rates set forth in Article 20 of Mutual's 1920 license and computed what they claim to be a "fair return" for the purpose of Section 3(13). Our difficulty with their approach arises from the fact that Section 3(13) defines the term "net investment" which is a component of the price paid by the United States

¹⁴The underscored parts were in the Federal Water Power Act and have been deleted. The bracketed parts were not in that Act and have been added by later legislation.

or a new licensee as specified in Sections 14(a) and 15(a); but Section 10(d) requires a licensee to reserve a portion of its earnings and to remove them from being available for dividends. The Commission said, in this connection, 42 FPC, at 333, that Section 10(d)

requires the setting aside of a proportion of surplus earnings in excess of a "specified reasonable *rate of return*" which is to be set forth in the license. And this specified rate of return is contrasted with "fair return" as mentioned in Section 3(13).

While we reject their approach because we think it confuses two different matters, we note that it treats Mutual as a profit-making entity without making any allowance for the fact that Mutual's not-for-profit status explains why it has not recovered its investment through the years through either distributions or accumulations of earnings, as we commonly think of earnings. Our analysis for a profit-making entity would be the same as for a not-for-profit entity, with the exception that payments to the enterprise (called revenues, rather than assessments) would be increased by an element representing profit, and the further exception that such revenues would be derived from persons who are not necessarily shareholders, and would be distributed in the form of earnings (rather than non-cash benefits), necessitating computations of "earnings" and a "fair return" in terms of dollars. While we understand and appreciate that Mutual, Escondido and Vista are attempting to apply the net investment formula, we believe that their approach to Mutual's status as a not-for-profit entity results in an understatement of its "earnings" and produces an unjust result.

After it is determined that a licensee has had earnings equaling a fair return on investment, the existence and extent of any additional or excess earnings represented by the three items must be determined. In this connection, the staff wit-

ness determined (a) that there was no unappropriated surplus, (b) that the aggregate credit balances of current depreciation accounts, projected to the expiration date of Mutual's 1924 license, equalled the amount of the investment¹⁵, and (c) that there were no appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments for other specified purposes.¹⁶ Therefore, he deducted the amount of the depreciation from the amount of the investment and determined that the "net investments" was zero.

We approve and adopt his approach and result and conclude that the "net investment" in Project No. 176 as of June 24, 1974, was zero.¹⁷

¹⁵We reject Mutual's, Escondido's and Vista's argument that the net investment cannot equal zero when the investment includes non-depreciable land or properties that are not fully depreciated. Net investment is not an application of depreciation to specific properties; it is not an offset of depreciation to assets, as on current-day balance sheets. Net investment is a general measure of the return through earnings of a licensee's investment in properties. Land and other properties can obviously produce earnings, and a licensee's investment in land and other properties can obviously be recovered through earnings even though the land is not depreciable and the properties are not fully depreciated.

Similarly, we reject their argument that the amount of depreciation to be deducted from the sum of the actual legitimate original cost and the similar cost of additions and betterments, should not include the depreciation applicable to the contributions of Vista and its predecessor, which are required by Section 3(13) to be deducted from the plant in service. Under the accounting concepts here involved, depreciation represents a recovery of investment through earnings rather than an offset against assets. In other words, the depreciation on those contributions is part of the total earnings of Mutual.

¹⁶Utilizing Article 20 of Mutual's 1924 license, the staff witness calculated that Mutual could have earned \$383,940 beginning with the 21st year of its license before it would have been required by Section 10(d) to establish amortization reserves, and that Mutual was not required to establish such reserves since it earned (received excess assessments of) only \$115,493.

¹⁷Opinion No. 36 discusses (at 25-26) Escondido's efforts, beginning in 1963, to acquire Mutual's assets, first by purchase, then by condemnation, and finally by a tender offer for Mutual's stock, and the efforts of others (including the Bands) blocking Escondido. While Mutual's "net investment" in Project No. 176 is zero, Escondido would be entitled by reason of the Act of August 15, 1953, to receive just compensation if today it had replaced Mutual as the licensee of Project No. 176 under the old license.

Fair Value

The United States or a new licensee is required to pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken. Since we can assume that the property which might be taken has some value, and since we have determined that the net investment is zero, Mutual's net investment in Project No. 176 does not exceed its fair value.

Severance Damages

In addition to the net investment not to exceed the fair value of the property taken, the United States or a new licensee is required to pay

such reasonable damages, if any, to property of the licensee valuable [and] serviceable [in the development, transmission, or distribution of power] and dependent [for its usefulness upon the continuance of the license] but not taken, as may be caused by the severance therefrom of property taken. . . .

Severance damages are those suffered by the remaining electric utility properties of the licensee; if all of the properties of the licensee are taken, there can be no severance damages. Furthermore, the damaged properties must be dependent for their usefulness upon the continuance of the license; if the remaining properties are as useful after the other properties are taken as before, there are no severance damages.

Since severance damages are limited by Section 14(a) to *electric* utility properties, we reject Mutual's, Escondido's and Vista's claim for severance damages to their *water* utility properties. Furthermore, we agree with the Commission staff's, Interior's and the Bands' position that there will be no severance damages if all of the works of Project No. 176 that are subject to the 1924 license, as amended,

are taken.

However, as indicated in Opinion No. 36, at 31, Interior requested the Commission in 1972 to recommend that the United States take over the portion of Project No. 176 from the diversion works on the San Luis Rey River to the point of discharge into Lake Wohlford, which would permit the Commission to relicense the portion of Project No. 176 downstream from the point of discharge into Lake Wohlford. While it is not clear whether Interior still favors such a plan, we would observe that such a partial takeover could result in severance damages to Mutual's Bear Valley electric properties. And, Section 14(a) notwithstanding, we are unable to determine the amount because a record was not developed for that purpose.

Contracts

In addition to the net investment not to exceed the fair value of the property taken, plus severance damages, the United States or a new licensee is required to "assume all contracts entered into by the licensee with the approval of the Commission." The only contracts that require the approval of the Commission and, consequently, must be assumed by the United States or a new licensee, are those specified in Section 22 of the Federal Power Act for the sale and delivery of power for periods extending beyond the termination of the license. The only contract involved herein that purports to sell power beyond the term of Mutual's 1924 license is the agreement of February 2, 1914, which, among other matters, provides for the sale and delivery of power to the Rincon Band for an indefinite period of time. While that contract obviously predated the Federal Water Power Act and could not have been "entered into . . . with the approval of the Commission", it was not thereafter approved by the Commission and, therefore, the

United States or a new licensee is not required by Section 14(a) to assume the obligation to continue to sell and deliver power to the Rincon Band.¹⁸

Constitutionality

We address last Mutual's, Escondido's and Vista's threshold challenge to the constitutionality of Section 14(a) if it is decided that Mutual's net investment is zero. And we reject their challenge because Section 6 of the Federal Water Power Act provided, as does Section 6 of the Federal Power Act, that "Each . . . license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act. . . ." Mutual accepted its 1924 license, including all of the terms of the Federal Water Power Act.

The hearings and debates on the Federal Water Power Act took place during the period of post-World War I inflation which was thought to be a cyclical and temporary matter, to be followed by depression. In such an atmosphere, those who wanted to protect utility investments from being eroded by deflation became proponents of a "net investment" takeover price and opponents of a "fair value" takeover price. See 42 FPC, at 334. The fact that there has been near continuous inflation in the 59 years since the passage of the Federal Water Power Act, with the notable exception of the depression of the 1930's, does not make Section 14(a) unconstitutional because licensees would have fared better

¹⁸It should be noted, on the other hand, that Article 34 of the new license for Project No. 176 requires the Licensees to use their best efforts to fulfill their valid contractual obligation to supply electric power to the Rincon Indian Reservation. On September 11, 1979, the United States District Court for the Southern District of California decided that certain aspects of the agreement of February 2, 1914, are void, including the alienation of 1.72 acres of the Rincon Indian Reservation for the Rincon power plant. The Court did not address the obligation to supply electric power to the Rincon Indian Reservation, and its decision is not final.

with a "fair value" standard. Section 14(a), in conjunction with Section 3(13), sought to assure the recovery of a licensee's investment, not to exceed the fair value of the property taken, either during the term of a license or at or after its expiration. Notwithstanding the many difficulties of interpretation and administration, we believe that it achieves that result.

On the other hand, situations in which project works are owned in part by "persons" and "corporations" that are subject to the Section 14(a) takeover formula, and in part by "States" and "municipalities" that are not subject to that formula because of the Act of August 15, 1953, produce results that can be awkward and difficult to justify. If the United States takes over all of Project No. 176, it will, in effect, pay nothing for Mutual's undivided interest in the outflow pipe from Lake Wohlford, and just compensation for Vista's undivided interest in the same facility. Under all of the circumstances discussed in this part of this Opinion and order, we stand ready to assist Congress if it chooses to take a fresh look at the question of the price to be paid by the United States or a new licensee for the property taken.

CERTAIN ERRORS CLAIMED BY THE BANDS AND INTERIOR

Federal Land Policy and Management Act of 1976

The Bands claim that we erred in issuing a new license for Project No. 176 which does not require the Licensees to obtain rights-of-way pursuant to the Federal Land Policy and Management Act of 1976 (Land Policy Act), particularly 43 U.S.C. § 1761(a)(4) (Opinion No. 36, at 40), through the government non-Indian¹⁹ lands utilized by the

¹⁹The Land Policy Act defines the term "right-of-way" in 43 U.S.C. § 1702(f) as including "an easement, lease, permit, or license to occupy, use, or traverse public lands", and defines the term "public lands" in 43 U.S.C. § 1702(e) as excluding "land held for the benefit of Indians. . . ." Accordingly, there are no apparent Indian-related obstacles to the Licensees' obtaining the rights-of-way in question.

project. Interior claims that the license is void until the rights-of-way required by the Land Policy Act are obtained. The Licensees contend, on the other hand, that they don't have to obtain rights-of-way under the Land Policy Act because they already have valid rights-of-way which are not terminated by that Act.

It is clear that the Federal Water Power Act since 1920, and Part I of the Federal Power Act since 1935, have given Commission licensees authority to occupy and utilize government non-Indian lands for the purpose of constructing, operating and maintaining licensed project works. It is equally clear that the Commission's authority to authorize the use, occupancy and enjoyment of such lands in conjunction with licensed water power projects has been *exclusive* and, therefore, it has not been necessary to include conditions in licenses requiring Commission licensees to obtain similar authority for such lands from the Secretaries of Agriculture or of the Interior.

Sections 705 and 706 of the Land Policy Act repeal numerous laws relating to the administration of public lands and to rights-of-ways, but the Federal Power Act is not listed among those laws. Indeed, the savings provision of the Land Policy Act (43 U.S.C. § 1701(f)) expressly provides that "Nothing in this Act shall be deemed to repeal any existing law by implication." And it also provides (43 U.S.C. § 1701(g)) that

Nothing in this Act shall be construed —

* * *

(4) as superseding, modifying, or repealing, except as specifically set forth in this Act, existing law applicable to the various Federal agencies which are authorized to develop or participate in the development of water resources or to exercise licensing or regulatory functions in relation thereto. . . .

Considering —

It has always been understood that the principle purpose of the Federal Water Power Act of 1920 was to establish a national policy to promote the comprehensive development of water power on government lands and navigable waters other than by the government itself, and that such policy would be administered by abolishing the piecemeal authorities of the Secretaries of the Interior, Agriculture and War over the nation's hydro-electric resources and centralizing them in the Federal Power Commission.²⁰

— it is inconceivable that in 1976 Congress, *sub silentio*, reimposed a duplicate system of federal authority over water power development. 43 U.S.C. § 1761(a)(4), which requires rights-of-way permittees of the Secretaries of Agriculture and the Interior to “also comply with all *applicable* requirements of the Federal Power Commission under the Federal Power Act of 1935” [Emphasis added], should be construed as being limited to Part II of the Federal Power Act which was newly enacted in 1935.

In any event, we do not agree that the new license for Project No. 176 is void until the Licensees obtain rights-of-way from Interior. While we also do not agree that the Licensees have to obtain such rights-of-way, at best, 43 U.S.C. § 1761(a)(4) requires them to obtain a second authorization. And if it does, it is not necessary to condition the license to require them to comply with that statute.

Article 5 of Forms L-16 and L-20 (October 1975), which is typical of the Commission's standard license conditions and is part of the new licenses for Project Nos. 176 and 559, routinely allows licensees five years from the date of

²⁰Opinion No. 36, at 36. Derived from *Montana Power Company v. Federal Power Commission*, 445 F.2d 739 (C.A.D.C., 1970), at 750.

the issuance of a license to obtain title to, or the right to use, whatever non-government lands are necessary or appropriate to enable them to construct, operate and maintain the licensed project works. We know of no reason why the Licensees of Project No. 176 shouldn't be allowed the same or a similar period of time to obtain a second authorization from Interior, if one is necessary, particularly since Interior has not indicated that the Licensees cannot obtain any rights-of-way that may be necessary or appropriate to enable them to construct, operate and maintain the licensed project works. Hopefully, the question of exclusive or duplicate federal authority will be resolved by that time.

"Reservation" of Water Rights

The Bands and Interior contend that we erred in failing to extend the protection of the first proviso of Section 4(e) of the Federal Water Power Act — that is, make the interference/inconsistency finding, and apply Interior's conditions — to the Pala and Pauma (including the Yuima) Indian Reservations. They point out, correctly, that the term "reservations" is defined in Section 3(2) of the Federal Power Act as including "interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation", and, also, "interests in lands acquired and held for any public purposes". And they argue that the Bands' reserved water rights, including in particular the reserved water rights of the Pala and Pauma Bands, are "interests in lands" within the purview of Section 3(2) and, consequently, that such reserved water rights are "reservations" which are subject to the protection of Section 4(e).²¹

²¹Their argument is the same as or similar to one which was raised in Opinion No. 2 (*Puget Sound Power and Light Company*, Project No. 2494), issued October 28, 1977, and not reached or addressed by the Commission.

The first proviso of Section 4(e) states that "licenses shall be issued within any reservation" only after the specified finding by the Commission, and shall be subject to and contain the specified conditions. No one contends that the first proviso of Section 4(e) should be taken literally — that it applies when the members of the Commission vote upon the issuance of a license when they are physically within a reservation. Such an absurd construction prompts a rational interpretation. And since the issuance of a license is the Commission's authorization to construct, operate and maintain project works, we have construed the first proviso of Section 4(e) to mean

That the Commission shall license the construction, operation and maintenance of project works within any reservation only after finding that the construction, operation and maintenance of the works will not interfere or be inconsistent with the purpose for which such reservation was created or acquired.

The Bands argue that project works proposed to be constructed on non-navigable water and *affecting* reservations are required by Section 23(b) of the Federal Power Act to be licensed and, consequently, that a license *affecting* a reservation is a license "within" a reservation within the purview of the first proviso of Section 4(e). But if that were so, there would seem to be no need for the provision in the first sentence of Section 23(b) that project works proposed to be constructed "*upon* any part of the . . . reservations of the United States" (emphasis added) are required to be licensed, for project works which affect reservations certainly include those which are constructed upon reservations. We believe that the word "within" and the phrase "upon any part of the . . . reservations" are used in the statutory provisions in contexts of physical areas. And we conclude that while the first proviso of Section 4(e) applies

to "reservations" in their physical context as defined in Section 3(2), it does not apply to "reservations" in the non-physical sense advocated by the Bands and Interior.

Diversions of Water (Article 29) Motion to Reopen Record

The Bands and Interior complain that Article 29 of the new license for Project No. 176, which provides for diversions of water to the Indian Service Area, does not preclude the license from interfering or being inconsistent with the purpose for which the La Jolla, Rincon and San Pasqual Indian Reservations were created. Because the plan for diversions of water which is embodied in Article 29 was first promulgated in Opinion No. 36, they filed a motion to reopen the record to scrutinize the plan, together with an affidavit which enumerates asserted deficiencies in the plan.

Many of the deficiencies enumerated in the affidavit and the Bands' and Interior's applications for rehearing are the result of their failure to comprehend that the first proviso of Section 4(e) does not require that adequate supplies of water be furnished to the three reservations if such supplies do not otherwise exist, as during dry summer periods. It requires only that the new license for Project No. 176 may not interfere or be inconsistent with those supplies. However, the practicable way to avoid interference or inconsistency is to furnish sufficient water to offset possible adverse effects of a project on existing water supplies. And the fact that the water which is so furnished may be less than an ideal supply does not require a conclusion that the supply fails to preclude interference or inconsistency.

We are, of course, aware of the fact that the plan for diversions of water which is embodied in Article 29 was not scrutinized on the record. It is our plan, designed to condition the project to meet the standard of Section 10(a), including water for dry summer periods. We are also aware

of the fact that the different parts of the Indian Service Area along the Escondido Canal have no storage facilities and that the Licensees' service areas below the Escondido Canal have storage as well as distribution facilities. Accordingly, we provided in Article 27 for the filing of a permanent water operating plan for Project No. 176 under which the comprehensive plan adopted in Opinion No. 36 will be refined to maximize its benefits and minimize its liabilities. But, as the Bands and Interior point out, we did not state explicitly in Article 27 that the permanent water operating plan shall consider the water needs of the Indian Service Area as well as the service areas of the Licensees. While we believe that is implicit in Article 27, we are modifying it to so provide.²²

Upon consideration of the asserted deficiencies in the plan for diversions of water which is embodied in Article 29, we see no need to reopen the record at this time to consider those deficiencies and, therefore, we will deny the Bands' and Interior's motion.²³ Details of the plan for diversions of water can be clarified in conjunction with our consideration of the permanent water operating plan.

The Licensees can close the Escondido Canal pursuant to Article 29 only for scheduled maintenance and scheduled and unscheduled repairs, or other prudent reasons. We contemplate that all closing will be for the shortest practicable times and the shortest practicable distances along the conduit. Flexibility for "other prudent reasons" is essential, but the Bands should not be alarmed since the permanent water operating plan must consider the needs of the Indian

²²The permanent water operating plan should include a maintenance schedule which is consistent with those water needs.

²³The affidavit attached to their motion has become part of the record because it was filed as part of their motion and, therefore, there is no need to act on their further request that it be added to the record.

Service Area.

Article 29 does not preclude recharging the Pauma Basin (which underlies both the Rincon and Pauma Indian Reservations) incidental to irrigating the Rincon Indian Reservation. We said in Opinion No. 36, at 114, that water cannot be released "solely for the purpose of recharging the Pauma and Pala Basins," and at 150, that irrigation of the Rincon Indian Reservation principally for the purpose of recharging the Pauma Basin is prohibited. In other words, recharging per se, and over-watering for recharging, are prohibited. But, as indicated, recharging incidental to irrigating the Rincon Indian Reservation is permitted.

The possible redesignation of the Indian Service Area and imposition of limits upon volumes or flows in conjunction with or following the final disposition of the pending litigation involving the water and related contractual rights which are incident to Project No. 176 (Opinion No. 36, at 146 (Footnotes 191 and 192)), is intended to be consistent with the final disposition of that litigation. Any question of priorities can also be resolved at that time. While the Director of the Division of Licensed Projects, Office of Electric Power regulation, or that officer's Deputy, would be required to exercise his judgment in passing upon the plans and specifications for diversion facilities, he would also be required to authorize diversions of water whenever he finds that the requested volumes and flows "can be . . . utilized for domestic, agricultural, stockwatering or small commercial consumption within the Indian Service Area" within a reasonably foreseeable period.²⁴

²⁴Among the considerations for including the particular portions of the San Pasqual Indian Reservation within the Indian Service Area, the eastern portion is largely irrigable and has no substantial source of water other than the Escondido Canal, the southwestern portion is largely non-irrigable, and the northwestern portion is largely irrigable and has a substantial source of water other than from the Escondido Canal.

Mission Indian Relief Act

The Memorandum of Decision of the United States District Court for the Southern District of California dated September 11, 1979, states that the Mission Indian Relief Act (MIRA)

was a comprehensive effort on the part of Congress to address thoroughly the problem of securing and preserving reservation lands for the Mission Indians. Because Congress did attempt to deal with the issue of Mission Indian lands in a comprehensive fashion, it is proper to view MIRA as embracing all of the procedures that Congress intended to be implemented with respect to those lands. Accordingly, in regard to agreements pertaining to the conveyance of water across reservation lands, § 8 [Opinion No. 36, at 28 (Footnote 47)] should be viewed as completely satisfying the safeguards that Congress meant to provide for the Indian lands in question here.

The Decision also states that, as a result, Section 8 controls over Section 946 (of another statute which is not relevant here) "as the exclusive means of granting canal rights of way across Mission Indian Reservations."

The Court held that the agreement of June 4, 1894 (Opinion No. 36, at 9), is valid under Section 8 insofar as it permits the diversion of San Luis Rey water into the Escondido Canal and grants a right-of-way across the La Jolla Indian Reservation. The Court also held that the agreement of June 4, 1894, is void under Section 8 as to the Rincon Indian Reservation because the Rincon Band was not a party to the agreement, and that the Interior-granted 1908 rights-of-way across the three reservations utilized by the Escondido Canal are void under Section 8 because the La Jolla and Rincon Bands (who received patents in 1892) were not parties, and because Interior failed to condition the right-

of-way across the San Pasqual Indian Reservation (which was not patented until 1910) upon the supply of sufficient water to the San Pasqual Band.

The Bands contend that Section 8 concerns rights-of-way for the conveyance of water, and that we have taken too narrow a view by focusing on the language pertaining to the construction of appliances for the conveyance of water, which is equivalent to the granting of the rights-of-way. They say,

Limiting Section 8 to new construction activities so as to preclude its application to the issuance or renewals of rights of way would be contrary to the legislative purpose.

They argue that the Escondido Canal has been changed in many ways through the years without contracts with the Bands or Interior's approval,²⁵ and that Section 6 of the Federal Power Act precludes the Commission from granting a perpetual right to utilize the rights-of-way.

Section 8 of MIRA does not impose any time limits on rights-of-way through Mission Indian reservations, except insofar as such limits might be included in the terms of any contracts or Interior's authorizations or approvals; and the agreement of June 4, 1894, does not place any such time limits on the La Jolla Band's authorizations of the Escondido Canal through their reservation. While we can authorize the utilization under the Federal Power Act of those Indian lands for a maximum period of 50 years, subject to additional periods under annual licenses, we see no legal basis for the Bands' claim that they can renew their 1894 authorization

²⁵Section 8 of MIRA provides that a person desiring to construct an appliance for the conveyance of water through a reservation must obtain Interior's authorization prior to the issuance of a patent for the reservation, or enter into an Interior-approved contract with the Indians of the reservation after the issuance of such a patent.

at the same time. The La Jolla Band has granted, with Interior's approval, a *perpetual* authorization for the Escondido Canal through the La Jolla Indian Reservation and its desire now, with the other Bands, to be left to its own devices to "obtain much more favorable rental and water supply terms than are contained in the Commission's new license" (Application for Rehearing, at 33), in the face of an expired license and immovable facilities, appears to be the reason for the Bands' opposition to the new license.

Insofar as Section 8 of MIRA addresses the possible new construction on the San Pasqual Indian Reservation, Article 32 of the new license for Project No. 176 requires the Licensees to use their best efforts to negotiate a reasonable contract with the San Pasqual Band and to obtain Interior's approval.²⁶ However, Opinion No. 36 attempts to balance the bargaining positions of the Licensees, and the Bands and Interior, by indicating, at 120a, that there are certain alternatives to the construction and the contract.

If the Licensees do not have valid Interior- or Band-granted rights-of-way through the Rincon and San Pasqual Indian Reservations, and if they are unable to negotiate reasonable agreements for such rights-of-way with the affected Bands and obtain Interior's approval under conditions which are satisfactory to this Commission, Section 8 of MIRA, preserving the integrity of Mission Indian lands, and the Federal Power Act, establishing a national policy to promote the comprehensive development of water power on government lands and navigable waters, will come into di-

²⁶The rights conferred on the Bands by relevant treaties and laws "must be assessed, as required by Section 4(e), as a precondition to issuance of any long-term license affecting the Band's tribal lands." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Federal Power Commission*, 510 F.2d 198 (CA9, 1975), at 212. We believe that we have met our responsibility under MIRA if Section 8 is applicable.

rect confrontation.

In January 1891 Congress addressed the matter of constructing appliances and granting rights-of-way for the conveyance of water through Mission Indian lands. Almost 30 years later, in June 1920, Congress addressed the matter of licensing the construction, operation and maintenance of facilities for the development of electric power on government lands, including Indian lands, and navigable waters. The latter statute gives the Commission power to authorize the use of Indian lands for water conduits utilized in conjunction with the development of water power, and the question is whether the Commission can grant such authorization with respect to Mission Indian lands if the Licensees cannot obtain a right-of-way under the Mission Indian Relief Act. While we understand that implicit repeals are not favored, our position is that Section 29 of the Federal Power Act repeals Section 8 of the Mission Indian Relief Act to the extent of any inconsistency between them and, consequently, that the Commission may grant such authorization. The legislative history of, and the many court decisions interpreting, the Federal Water Power Act and Part I of the Federal Power Act, together with the specific authority over Indian lands granted in Section 4(e) of the Federal Power Act, persuade us that the comprehensive licensing scheme administered by the Commission applies to Mission Indian lands notwithstanding Section 8 of MIRA.

The irony is that the present controversy is over water and dollars, rather than the development of power and the integrity of Indian lands. The generation of electric power is and always has been incidental to the primary purpose of Project No. 176 of conveying water for domestic and irrigation consumption. And the physical intrusions on the reservations are minor, comprising 0.3% in the case of La Jolla, 0.7% in the case of Rincon, and 2.6% in the case of

San Pasqual (subject to reduction by possible new construction).²⁷ Accordingly, it appears that the power license and the integrity of Indian lands are pawns in the two-forum controversy over water and dollars, soon to enter the legislative forum of Congress.

Annual Charges (Article 30)

Opinion No. 36 states, at 158,

[T]he annual charges of one year will become operating expenses of Project No. 176 which will reduce the annual charges of the following year. The formula approach will reflect such rental expenses.

The Bands and Interior contend that the treatment of annual charges as operating expenses is contrary to *Montana Power Company v. Federal Power Commission*, 459 F.2d 863 (C.A.D.C., 1972), wherein the Court accepted the annual charges fixed by the Commission, stating at 870,

Under the profitability theory there would be a determination of the share of the total electric revenues of the Company attributable to Kerr, less the annual cost of producing power at Kerr, including a reasonable rate of return of the net investment of the Kerr facilities, but *not including in costs the rentals of the Tribal lands*. [Emphasis added.]

The term "annual charge" as used in Section 10(e) of the Federal Power Act means an annual rent or rental. From an accounting viewpoint, an annual charge is an operating expense which is treated in the same manner as other operating expenses. And the statement at 158 that "the annual charges . . . will become operating expenses of Project No.

²⁷This is not a case of destruction by flooding of a substantial part (22%) of an Indian reservation, as in the case of *Power Authority of the State of New York*, 21 FPC 146 (1946), which was ultimately reversed *sub nom Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960).

176" is correct.

Opinion No. 36 explains, at 170-172, the relationship between the "sharing of the net benefits" approach applied therein with respect to water benefits, and the "profitability" approach applied therein and in *Montana III, supra*, with respect to power benefits. When one is trying to determine a reasonable rental for tribal lands, it is appropriate under either approach to determine the "net benefits" or "profitability" of the enterprise without regard to the ultimate rental, thus excluding it from the costs used in the determination. Under the formula approach of Opinion No. 36, an annual charge for one year will be determined, billed and paid after the close of that year. Consistent with *Montana III, supra*, annual charges should not be included in the costs that are used for computing the Net Water Benefit. The statement at 158 that "the annual charges of one year will . . . reduce the annual charges of the following year" is not consistent with Article 30.

Article 30 of the new license for Project No. 176 allocates annual charges for the use, occupancy and enjoyment of tribal lands, ratably according to (1) the distance traversed by the Escondido Canal through those lands, and (2) the relative diversions of water to those lands. We believed, and still believe, that such an allocation formula is more equitable than the one proposed by the Bands and is the most equitable one that we could devise. Based on the present distances traversed by the Escondido Canal, 31.08% of the annual charge would be allocated to the La Jolla Band; 20.32%, to the Rincon Band; and 48.60%, to the San Pasqual Band. Those percentages would be adjusted annually, however, to reflect the relative diversions of water — so that the Band with the largest diversion (currently Rincon) will also have the largest adjustment. During the illustrative typical year (Opinion No. 36, at 198), 38.36%

of the annual charge would be credited to the La Jolla Band; 1.65%, to the Rincon Band; and 59.99%, to the San Pasqual Band.

The Bands state that they would prefer that the annual charges be allocated among them ratably according to the cost of rerouting the Escondido Canal around their respective reservations, which is their measure of the relative values of their lands to the Escondido Canal in particular and Project No. 176 generally. Under this approach, 58% of the annual charges would be credited to the La Jolla Band; 31%, to the Rincon Band; and 11% to the San Pasqual Band. The results in a typical year are shown in Footnote 33, *infra*.

Since the total amount of annual charges to be paid by the Licensees in any year would not be changed if the formula for allocating those charges among the Bands is changed, the Licensees would not be affected by such a change. Although we have no objection if the three Bands prefer such an arrangement, we choose for the reason discussed below to defer revising Article 30 of the new license for Project No. 176 to so change the allocation formula. Instead, we are adding a second paragraph to Article 28 to authorize our changing the allocation formula from time to time without obtaining the agreement of the Licensees.²⁸

Although the Bands have many interests in common against Mutual, Escondido and Vista, we are concerned over the fact that they have some interests which conflict with one another, and the further fact that some of the Bands

²⁸This new paragraph is added to Article 28 out of an excess of caution since such a change is not viewed as constituting an alteration of the license within the meaning of Section 6 of the Federal Power Act, that would require the agreement of the Licensees. See, e.g., *City of Holyoke*, Project Nos. 2863 and 2877, Order Denying Rehearing issued September 7, 1979 (mimeo at 4, n. 7).

have the same legal counsel. We mean to cast no aspersions against any attorney representing any of the Bands in this proceeding. We believe that the matter of allocating annual charges among the three Bands is one in which they have mutually conflicting interests and, consequently, may wish to have separate legal and other counsel to advise them as to what is in the best interest, of the particular Band. If, after having had an opportunity to obtain separate advice, the three Bands still agree that they prefer the cost-of-rerouting percentages, they can file a petition to that effect at or about the effective date of the license and we will so change the allocation formula, either with or without adjustment for the relative diversions of water, as they may prefer, or in any other manner in which they may agree.²⁹

In defining the term "Cost of Canal Water" for the purpose of Article 19 of Mutual's 1924 license (Opinion No. 36, at 232), we considered it important that Mutual's Project No. 176 and Vista's Henshaw development were operated as a single undertaking throughout the term of the license. Accordingly, we believe that the "Cost of Canal Water" properly includes that part of the cost of operating Vista's Henshaw development as Mutual's natural flow (4,143 acre-feet) bears to the total flow ("Net Canal Water" as measured leaving the Escondido Canal).

The Bands' challenge to "the Commission's formula for computing annual charges" (Application for Rehearing, at 65), is misleading and just plain wrong. We submit that that formula is "reasonable", as required by Section 10(e).³⁰

²⁹A similar change in Article 19 of Mutual's 1924 license can be effected at the same time or prior to the crediting of annual charges thereunder, whichever is more convenient.

³⁰Many of the figures in the discussion which follows are changed as a result of the Article 30 modifications which are discussed under "Annual Charges Under the 1979 License (Article 30)", *infra*. The Opinion No. 36 figures are retained in the discussion to respond meaningfully to the Bands' challenge.

Under that formula, the Net Water Benefit of Project No. 176 is computed, and a certain part of that Net Water Benefit — 9.29% — is allocated to the three Bands as the total annual charge for the use, occupancy and enjoyment of their tribal lands. Then, the total charge is allocated among the three Bands according to a second formula.

Under the second formula, tentative allocations of the annual charge are made according to the distance traversed by the Escondido Canal through the respective tribal lands. Those tentative allocations are then adjusted according to the relative diversions of water to those lands. In making those adjustments, the annual charge is recomputed on the hypothetical assumption that there are no diversions of water to the tribal lands. That recomputation does not change the amount of the annual charge that was already computed. The difference between the amount that was already computed and the recomputed amount is the amount by which an annual charge without diversions would have been reduced by the diversions to reach the actual annual charge, and that difference is the amount of the adjustment. The adjustment is then charged against the three Bands according to the relative diversions of water to their respective tribal lands.

In other words, the computation that is based on the assumption that the water is not diverted to the tribal lands is used to adjust an allocation of annual charges. And we submit that the Bands are challenging the second formula allocating and adjusting annual charges, rather than the formula for computing annual charges, as they claim.

The Bands are wrong in saying that if the Rincon Band's 1,427 acre-feet of water are not diverted in the typical year, "the total project net benefit attributable to that water is \$24,289 or \$17.02 per acre-foot." If the water is not diverted to tribal lands, 1,427 additional acre-feet would reach

Mutual and Vista, thereby increasing the Net Water Benefit of Project No. 176 by \$64,768 or \$45.38 per acre-foot.³¹ And of that amount, 37.5%, or \$24,289 would be allocated among the beneficial owners of the lands underlying the Escondido Canal and the Wohlford development. Of the latter amount, \$12,759, or 52.53%, would be allocated to the United States as the annual charge for the use, occupancy and enjoyment of its lands other than tribal lands embraced within Indian reservations; \$6,016, or 24.77%, would be allocated to the three Bands as the total annual charge for the use, occupancy and enjoyment of their tribal lands; and \$5,514, or 22.70%, would be treated as attributable to the owners of the remaining lands underlying the Escondido Canal and the Wohlford development, including Mutual.³²

A further aspect of the analysis is omitted by the Bands and illustrated in the following table with respect to the typical year:³³

³¹ Although the operating costs of Project No. 176 would not change if the water is not diverted, the Net Water Benefit would increase by \$64,768, representing the replacement cost of 803 acre-feet of Mutual's water at \$45.13 per acre-foot and 624 acre-feet of Vista's water at \$45.72 per acre-foot. (See Opinion No. 36, at 197 (Footnote 237), with respect to the allocation of acre-feet, and at 196, with respect to the cost of replacement water.) It is reasonable, therefore, that the total cost of \$45.38 per acre-foot should fall between the two individual costs, and could not possibly be the Bands' absurd figure of \$17.02.

³² The Net Water Benefit is the product of the interaction of all the lands and improvements comprising the project and, as a result, the Bands are entitled to an allocative share for their lands. It is meaningless to express an allocative share in terms of dollars or cents per acre-foot, and misleading to give the impression that the Bands are being cheated if they don't receive in annual charges the replacement value of the water they don't take. *Improvements and other lands* which contribute to the Net Water Benefit attributable to the water not taken by the bands are entitled to their allocative shares.

³³ The Bands' percentages, *supra*, would result in the following allocations (without adjustment for relative diversions):

	<u>With Diversion</u>	<u>Without Diversion</u>
La Jolla	\$14,892	\$18,381
Rincon	7,959	9,824
San Pasqual	2,824	3,486
Total	\$25,675	\$31,691

	Tentative	With <u>Diversion</u> Water Adjustment	Annual Charge	Without <u>Diversion</u> Annual Charge
La Jolla	\$ 9,849	- 0 -	\$ 9,849	\$ 9,849
Rincon	6,440	(\$6,016)	424	6,440
San Pasqual	15,402	- 0 -	15,402	15,402
Total	\$31,691	(\$6,916)	\$25,675	\$31,691

In the typical year the annual charges credited to the La Jolla and San Pasqual Bands would not be affected by the diversions of water to the Rincon Indian Reservation. If 1,427 acre-feet of water are diverted to that reservation, the Rincon Band will be credited with an annual charge of \$424. If, on the other hand, no water is diverted to that reservation, the Rincon Band will be credited with an annual charge of \$6,440, or an additional \$6,016, and not the \$1,286 claimed by the Bands.³⁴

Project No. 559

Opinion No. 36 states, at 180, that the principal function of SDG&E's Project No. 559 transmission line is to transmit power from the Rincon power house of Project No. 176 to SDG&E's Rincon Substation on the northern boundary of the Rincon Indian Reservation, at which point it interconnects with SDG&E's distribution system. Upon reconsid-

³⁴In other words, the Rincon Band would receive \$6,016 for 1,427 acre-feet of water, or \$4.22 per acre-foot, which is exactly equal to the Bands' 9.29% entitlement to the Net Water Benefit (Opinion No. 36, 9.29% entitlement to the Net Water Benefit (Opinion No. 36, at 168), applied to the cost of \$45.38 per acre-foot. Conversely, it would cost the Rincon Band \$6,016, or \$4.22 per acre-foot, if it chooses to utilize the water. These converse statements demonstrate the meaninglessness of expressing an allocative share in terms of dollars per acre-foot.

Contrary to the Bands' claim that diversions of water to the tribal lands "are automatically taken into account in the annual charge formula," diversions result in higher costs for each acre-foot of water received by Mutual and Vista, but do not result in higher operating costs for Project No. 176.

eration of the evidence, we have concluded that that statement and the description of the project lands in the new license for that project are not accurate.

Although the 12 kV transmission line in question transmits power approximately 2.4 miles from the Rincon power house to SDG&E's Rincon Substation, as indicated, it interconnects at Pole No. 12,111, approximately 0.6 miles from the Rincon power house, with SDG&E's 12 kV Circuit No. 216, which circuit is not shown on SDG&E's Exhibit J.³⁵ And the record indicates that the loads on that 12 kV transmission line between Pole No. 12,111 and the Rincon Substation are such that that segment of the line is not used primarily to transmit project power, but functions as part of SDG&E's distribution system. Accordingly, that segment of the line does not qualify as a primary transmission line licensable under the Federal Power Act. The licensable primary transmission line of Project No. 559 runs only from the Rincon power house to its point of junction with SDG&E's Circuit No. 216 at Pole No. 12,111. The description of the project lands in the new license for Project No. 559 is being revised accordingly, and Exhibit J, as required to be revised by that license, should show the interconnection with SDG&E's Circuit No. 216.

On the basis of a 40-foot wide and 2,992-foot long right-of-way (2.75 acres) and the maximum interest rate which

³⁵ Although SDG&E's Exhibit J does not show its 12 kV Circuit No. 216, that exhibit does show SDG&E's 69 kV transmission line, which apparently parallels and shares the poles and right-of-way with Circuit No. 216 to Pole No. 12,111; does *not* interconnect with SDG&E's 12 kV transmission line at that pole; and shares the poles and right-of-way with that 12 kV transmission line from Pole No. 12,111 to SDG&E's Rincon Substation. That 69 kV transmission line was licensed as Project No. 490 to Pole No. 12,111 and as part of Project No. 559 from that pole to SDG&E's Rincon Substation. That line is no longer a primary transmission line and, as a result, the license for Project No. 490 was allowed to expire and the new license for Project No. 559 does not include it among the project works.

is applicable to 1979 (67/8%), the annual charge for the use, occupancy and enjoyment of the tribal lands of the Rincon Indian Reservation by the Project No. 559 transmission line would be \$14.18 for 1979, or about \$25 per mile.³⁶

CERTAIN ERRORS CLAIMED BY THE LICENSEES

Annual Charges Under the 1979 License (Article 30)

The Licensees contend that there are a number of errors in Opinion No. 36 associated with annual charges, and they are joined in part by the Bands and Interior who view the amount of charges payable to the United States as significantly reducing the amount payable to the Bands. Although the Licensees now indicate that \$20,000, rather than \$10,000, should be the upper limit of compensation, the Bands say that

the Indian lands should receive the full monetary benefit of the project's water conveyance function while Escondido-Vista continue to receive and utilize the water and to obtain the complete benefit of the project's other functions.

Considering all of their arguments, we are persuaded to modify Article 30 of the new license for Project No. 176 in such a manner that in the typical year discussed in Opinion No. 36 at 196-198, the annual charges for the use, occupancy and enjoyment of the tribal and non-tribal lands of the United States (other than the relatively small charges associated with the Henshaw development, the generation of electric power and communication and other services by wire) would be reduced from \$80,124, of which \$54,449 would have been payable to the United States and \$25,675

³⁶See 18 CFR § 11.21: 2.75 acres × \$150 per acre × .06875 × .5 = \$14.18.

would have been placed to the credit of the La Jolla, Rincon and San Pasqual Bands, to \$35,575, of which \$3,669 would be payable to the United States (for 1979) and \$31,906 would be placed to the credit of the three Bands. The modifications of Article 30 reduce the said annual charges payable by the Licensees from 28.99% of the Net Water Benefit of Project No. 176 to 12.87%, and increase the said annual charges creditable to the three Bands from 9.29% to 11.54%.

The Bands contend that Opinion No. 36 is arbitrary, at 161, in assigning to the owner of the lands and improvements comprising the Henshaw development (Vista) one-half of the economic value of the water attributable to that development, and in assigning the other one-half of the economic value to the owners of the lands and improvements comprising the Escondido Canal (principally Mutual, Vista, the United States and the Bands). The Licensees contend that the opinion errs, at 162, in concluding that one-half of the water flowing through the Escondido Canal is attributable to the Henshaw development, and that the other one-half is attributable to the natural flow of the San Luis Rey River. They say that the staff witness on whose testimony we relied was not testifying as to annual charges, but as to "the importance of Henshaw from a licensing standpoint", and that three-fourths of the water flowing through the Escondido Canal is attributable to the Henshaw development because at least that portion of the water originates above Henshaw Dam. And while the Licensees state that there is "no evidence in the record which specifically calculated the incremental value of Wohlford storage", they contend that Opinion No. 36 errs, at 166-167, in treating the Wohlford development as having only a conveyance function. The Bands claim, in this connection, that we undervalued the relative contribution of the storage function of the Wohlford development, but they point out they are not claiming any

annual charges for the storage benefits of the Henshaw and Wohlford developments (Opinion No. 36, at 153).

The interrelated arguments of the Licensees and the Bands persuade us to modify Article 30 in certain respects. Although the Bands say that they are not claiming annual charges for the storage benefits of the Henshaw and Wohlford developments, the fact is that the Escondido Canal probably would not exist if it weren't for the storage benefits of the Wohlford development, or a similar facility. Without storage somewhere, the usefulness of the Escondido Canal would be limited to the amount of water that can be diverted from the San Luis Rey River and consumed in Mutual's and Vista's service areas during the rainy winter months only. The storage benefits of the Henshaw and Wohlford developments contribute significantly to the total volume of water that passes through the Escondido Canal and, consequently, to the Net Water Benefit which is computed on that volume. The Bands are claiming annual charges for the conveyance through their reservations of water to be stored in the Wohlford development, as well as Henshaw-stored water, which together is all of the water that passes through the Escondido Canal. While the Bands may not be claiming annual charges for the storage benefits of the two developments, the conveyance benefits contributed by their reservations depend in large part upon the storage benefits of those developments. In any event, it is necessary to consider the relative contributions of Henshaw and Wohlford development storage to the Net Water Benefit of Project No. 176 in order to determine the relative contributions of Indian reservation conveyance to that Net Water Benefit.

The testimony of the staff witness, in the Licensees' words, as to "the importance of Henshaw from a licensing standpoint", is the only evidence in the record as to the relative importance of Henshaw development storage. Although 75%

or more of the natural flows of the San Luis Rey River at the diversion dam originate above Henshaw Dam, the origin of the flows (as being above or below that dam) is not a proper measure of the relative importance of Henshaw development storage since some of those flows would be diverted into the Escondido Canal if the Henshaw development did not exist. Accordingly, there is no error in the conclusion that the water flowing through the Escondido Canal is attributable equally to the Henshaw development and the natural flows of the San Luis Rey River.³⁷

When two factors, such as storage and conveyance, operate in succession upon a commodity, such as water, to produce an economic value, there may not be a precise way to measure the economic value attributable to each of those factors, as the Bands suggest. But in the absence of a suggestion of a better method of apportionment, and of measuring the relative contributions of the two factors, the assignment of one-half of that economic value to each of those factors is the fairest and most practicable and rational method of dividing that economic value between the two factors. Accordingly, we are persuaded that there is no error in the apportionment of the economic value of the Henshaw-stored water (50% of the Escondido Canal water) as between the lands and improvements comprising that development, and the lands and improvements comprising the Escondido Canal. But we are equally persuaded that there is error in not apportioning the economic value of Wohlford-stored water in the same manner.

As discussed in Opinion No. 36, at 165-168, we had great difficulty determining the relative importance of Wohl-

³⁷The parties are reminded, in this connection, that they may make such studies as they choose to measure the relative importance of the key facilities of Project No. 176 for the purpose of future readjustments of annual charges pursuant to Section 10(e) of the Federal Power Act.

ford development storage to the Net Water Benefit of Project No. 176. We said that the conveyance function of the Wohlford development is less important than the conveyance function of the Escondido Canal. We also said that the construction of Henshaw Dam and the availability of MWD water made the storage function of the Wohlford development less critical to a reliable water supply and, consequently, that we had difficulty perceiving how the Wohlford development makes more water available to the computation of the Net Water Benefit. Accordingly, we used the linear distance through the Wohlford development as the measure of its conveyance *and* storage functions.

The Bands point out, in this connection, that the capacity of the Escondido Canal is not large enough to convey, at the same time during the summer months of peak water demand, Mutual's natural flow water originating above the diversion dam, and Vista's stored water originating above Henshaw Dam. They say that, as a result, during the winter months the Escondido Canal conveys Mutual's natural flow water to the Wohlford development where it is stored for summer consumption, and during the summer months the Escondido Canal conveys Vista's Henshaw-stored water to that development where it is flowed-through for consumption. And they argue that the Wohlford development makes more water available to the computation of the Net Water Benefit in view of the limited capacity of the Escondido Canal.

We agree with their conclusion generally, but disagree insofar as it attributes the additional volumes to the Wohlford development *alone*. Rainfall throughout the San Luis Rey watershed and in nearby areas is virtually nonexistent during June, July, August and September and, as a result, there is little or no natural flow for conveyance through the Escondido Canal during those months. The Wohlford de-

velopment receives Mutual's natural flow water from the Escondido Canal during the winter months and stores it for summer consumption, which storage adds an economic value to that water which would not exist with the trans-basin conveyance alone. The fact that the Wohlford development is below the Escondido Canal makes it possible to utilize that canal for Vista's Henshaw-stored water during the summer months and, in that sense, the Wohlford development contributes *in conjunction with the Henshaw development* to the total volume of water utilized for computing the Net Water Benefit. In other words, both storage developments are required to realize the total volume of water and, consequently, the total Net Water Benefit.

As in the case of the Henshaw development storage followed by the Escondido Canal conveyance, the Escondido Canal conveyance followed by the Wohlford development storage operates in succession upon the natural flow water to produce an economic value, which will be apportioned equally between the conveyance and storage factors in the absence of a suggestion of a better method of apportionment and measurement. Accordingly, we are persuaded that the economic value of the natural flow water (50% of the Escondido Canal water) should be apportioned equally as between the lands and improvements comprising the Escondido Canal, and the lands and improvements comprising the Wohlford development. As a result, the allocation arrow (Appendix B to Opinion No. 36) should be modified to show 25% of the canal water, consisting of 50% of the natural flow water benefits assigned to conveyance, as being allocated among the owners of the lands and improvements associated with the Wohlford conveyance/storage function. As a further result, the allocation arrow should be modified to show 25%, rather than 37.5%, of the canal water, consisting of 50% of all water benefits assigned to conveyance,

as allocated to the owners of the lands associated with the conveyance function; and Article 30 is being modified to reflect that change.

When the formula for computing annual charges for the utilization of tribal lands as modified herein is reduced to its basics, 50% of the Net Water Benefit is assigned to the economic value of the storage of the water, wherever it occurs, and the other 50% of the Net Water Benefit is assigned to the economic value of the trans-basin conveyance of the water. Of the latter, 50% (25% of the Net Water Benefit) is treated as being attributable to the facilities associated with that conveyance, and the other 50% (25% of the Net Water Benefit) is treated as being attributable to the land associated therewith. Accordingly, the percentage of water flowing through the Escondido Canal as consisting of the natural flow the San Luis Rey River, rather than *Henshaw*-stored water, is immaterial.

Article 30 does not provide compensation to the United States in accordance with the formula in 18 CFR § 11.21(b) for the use, occupancy and enjoyment of its lands other than tribal lands embraced within Indian reservations.³⁸ Instead, it compensates the United States in the same manner as the Bands through an allocative share of the Net Water Benefit of Project No. 176.³⁹ As discussed at 164-164a, that amount was designed to preserve certain principles embodied within Article 30. The Licensees contend that our departure from 18 CFR § 11.21(b) in the circumstances of this case violates

³⁸For 1979 the United States would be paid an annual charge pursuant to 18 CFR § 11.21(b) of \$10.3125 per acre ($\$150 \text{ per acre} \times .06875$) on 174.76 acres within the Escondido Canal portion of the project area (Exhibit K-1 dated January 1975), or \$1,802, and on 181 acres within the Lake Wohlford portion of the project area, or \$1,867, making a total of \$3,669.

³⁹In a typical year the United States would be paid an annual charge pursuant to Article 30 of \$54,449 (Opinion No. 36, at 197).

certain principles of administrative due process and that any charges in excess of the amounts provided by 18 CFR § 11.21(b) would be inherently unreasonable. They are joined in the latter argument by the Bands and by Interior who contend that annual charges for non-tribal lands of the United States should be waived, or at least fixed under 18 CFR § 11.21(b).

Without passing on the merits of the respective arguments, we are modifying Article 30 to compensate the United States pursuant to 18 CFR § 11.21(b) for the use, occupancy and enjoyment of its non-tribal lands. Interior said in the past (Exhibit B-140) that the determination of annual charges for such lands is within our jurisdiction and that it would not object to the issuance of a license waiving such charges. Whether or not Interior thereby recommended a waiver, the parties have not called our attention to any persuasive reasons why annual charges for non-tribal lands of the United States should be waived pursuant to Section 10(i) of the Federal Power Act.

The problem to be avoided by compensation the United States through an allocative share of the Net Water Benefit, arises from the fact that such a share in a typical year is considerably higher than the annual charge computed under 18 CFR § 11.21(b). If the difference between the two amounts is allocated to the beneficial owners of the remaining lands associated with the trans-basin conveyance that contribute to the Net Water Benefit (the Bands and the Licensees), such owners would receive more than their allocative shares. But if the difference between the two amounts is *not* so allocated, then the owners of the improvements associated with the trans-basin conveyance that contribute to the Net Water Benefit (the Licensees) would retain more than their allocative shares. Although the problem would have been avoided by eliminating the differential, so that

all interested parties including the United States would receive their allocative shares, it now appears that essentially the same result can be reached by splitting the difference between the two amounts equally between the owners of the remaining lands and the owners of the improvements associated with the trans-basin conveyance that contribute to the Net Water Benefit.

Since Article 30 is being modified to allocate 25% of the Net Water Benefit of Project No. 176 to the owners of the lands and improvements comprising each of the Henshaw and Wohlford developments, it is appropriate to allot the difference between the Net Water Benefit attributable to the non-tribal lands of the United States associated with the trans-basin conveyance⁴⁰ and the annual charge for those lands computed under 18 CFR § 11.21(b)⁴¹, equally between the owners of the improvements and the owners of the remaining lands comprising the Escondido Canal portion of the project area. And it is appropriate to allocate the latter amount ratably among the owners of the remaining lands of that area according to the distance traversed by the Escondido Canal through those lands. Article 30 is being modified to so provide.

In the illustrative typical year, the Net Water Benefit of Project No. 176 will be \$276,412 (Opinion No. 36, at 196). Of that amount, \$69,103, or 25%, will be allocated to the owners of the lands and improvements comprising the Henshaw development, who are principally the Licensees.⁴² Of

⁴⁰The non-tribal lands of the United States comprise 56.96% of the Escondido Canal traverse. Thus, 56.96% of 25% of the Net Water Benefit of \$276,412, or \$39,361, would be attributable to such lands.

⁴¹\$1,802, per Footnote 38.

⁴²The Licensees will pay the United States a small annual charge for the small part of the Cleveland National Forest utilized by the Henshaw development.

the \$276,412, another \$69,103, or 25%, will be allocated to the owners of the lands and improvements comprising the Wohlford development, who are the Licensees and the United States.⁴³ A third \$69,103, or 25%, will be allocated to the owners of the improvements comprising the Escondido Canal, who are the Licensees. And the remaining \$69,103, or 25%, will be allocated to the beneficial owners of the lands utilized by the Escondido Canal. Of that amount, \$19,556, or 28.30%, will be allocated to the three Bands as the first part of the annual charge for the use, occupancy and enjoyment of their tribal lands by the Escondido Canal. But for the annual charge of \$1,802 (for 1979) payable to the United States under 18 CFR § 11.21(b), \$39,361, or 56.96% of the \$69,103, would otherwise be allocable to the United States for the use, occupancy and enjoyment of its lands utilized by the Escondido Canal other than tribal lands embraced within Indian reservations.

The annual charge payable to the United States under 18 CFR § 11.21(b) for the utilization of its non-tribal lands by the Escondido Canal, or \$1,802 (for 1979), will be deducted from the \$39,361 otherwise allocable to the United States for such utilization of those lands. And 50% of the difference of \$37,559, or \$18,779, will be allocated to the owners of the improvements comprising the Escondido Canal, who are the Licensees. The other 50%, or \$18,780, will be allocated to the beneficial owners of the remaining lands utilized by the Escondido Canal. Of that \$18,780, \$12,350, or 65.76%,⁴⁴ will be allocated to the three Bands as the

⁴³The Licensees will pay the United States an annual charge of \$1,867 for 1979 (see Footnote 38) for its non-tribal lands utilized by the Wohlford development.

⁴⁴When the non-tribal lands of the United States are eliminated from the traverse of the Escondido Canal, the 20,344-foot traverse on tribal lands represents 65.76% of the remaining 30,937-foot traverse. See Opinion No. 36, at 164.

second part of the annual charge for the use, occupancy and enjoyment of their tribal lands by the Escondido Canal. Accordingly, the total annual charge placed to the credit of the three Bands will be \$31,906, or 11.54% of the Net Water Benefit of Project No. 176.

Turning to the allocation of the annual charge among the three Bands, in the illustrative typical year the Gross Water Benefit of Project No. 176 will be \$341,180 without diversions of water to the Rincon Band (Opinion No. 36, at 197). Of that amount, \$85,295, or 25%, will be allocated to the beneficial owners of the lands utilized by the Escondido Canal. Of that amount, \$48,584, or 56.96%, would be allocable to the United States for the use, occupancy and enjoyment of its lands utilized by the Escondido Canal other than tribal lands embraced within Indian Reservations. And \$24,138, or 28.30%, will be allocated to the three Bands.

The annual charge of \$1,802 (for 1979) will be deducted from the \$48,584; and 50% of the difference of \$46,782, or \$23,391, will be allocated to the beneficial owners of the remaining lands utilized by the Escondido Canal. Of the latter amount, \$15,382, or 65.76%, will be allocated to the three Bands. Of the Bands' total allocation of \$39,520 (\$24,138 + \$15,382), tentatively \$12,283, or 31.08%, would be allocated to the La Jolla Band; \$8,030, or 20.32%, to the Rincon Band; and \$19,207, or 48.60%, to the San Pasqual Band.

The difference between the aggregate tentative credits of \$39,520 and the annual charge of \$31,906, or \$7,614, will be charged against the three Bands ratably according to the respective volumes of water diverted to their tribal lands. In the illustrative typical year, the entire \$7,614 will be deducted from the tentative credit of the Rincon Band since it will be the only one to receive water from the Escondido Canal. Accordingly, annual charges of \$12,283 will be cred-

ited to the La Jolla Band; \$416, to the Rincon Band; and \$19,207, to the San Pasqual Band.⁴⁵

Annual Charges Under the 1924 Licence (Article 19)

The Licensees call our attention to the fact that in adapting Article 30 of the 1979 license for Project No. 176 to Article 19 of the 1924 license, we would increase the annual charges payable for the use, occupancy and enjoyment of the non-tribal lands of the United States, and that such action is prohibited by 18 CFR § 11.21(e), which provides,

No licensee under a license issued prior to August 26, 1935, shall be required to pay annual charges in an amount greater than prescribed in such license, except as may be otherwise provided in the license.

While Section 10(e) of the Federal Power Act, since 1935, has authorized adjustments from time to time of annual charges for *non-tribal* lands of the United States, Section 10(e) of the Federal Water Power Act, prior to 1935, did not specifically authorize such adjustments. Accordingly, we agree with the Licensees and are modifying Ordering Paragraph (D) of Opinion No. 36 to eliminate the amendments to Article 19 of the 1924 license which would have increased the annual charges for the use, occupancy and enjoyment of the *non-tribal* lands of the United States.

⁴⁵Under the Bands' approach based on the cost of rerouting the Escondido Canal around their respective reservations, the annual charge of \$31,906 would be allocated among them as follows:

	<u>Per Cent</u>	<u>Without Diversion Adjustments</u>	<u>With Diversion Adjustments</u>
La Jolla	58	\$18,505	\$22,922
Rincon	31	9,891	4,637
San Pasqual	11	3,510	4,347
Total	100	\$31,906	\$31,906

On the other hand, Article 19 is expressly subject to Section 10(e), and that provision has always authorized adjustments from time to time of annual charges for *tribal* lands embraced within Indian reservations. Accordingly, 18 CFR § 11.21(e), which implements the statutory provision with respect to licenses issued before the 1935 amendment, does not preclude adjustments from time to time of annual charges for tribal lands (which, in turn, are governed by 18 CFR § 11.22).

In adapting Article 30 of the 1979 license to Article 19 of the 1924 license, we are including the changes made by this Opinion and order on rehearing. Since the Net Water Benefit under the 1924 license is designed to reflect Mutual's natural flow entitlement and to exclude Henshaw-impounded water, the economic value of the natural flow water (100% of the Escondido Canal water) is being apportioned equally as between the lands and improvements comprising the Wohlford development, and the lands and improvements comprising the Escondido Canal. And the latter is being apportioned equally as between the owners of the improvements comprising the Escondido Canal, and the owners of the lands utilized by the Escondido Canal. The 25% of the Net Water Benefit is allocated among the beneficial owners of the lands utilized by the Escondido Canal in the same manner as Article 30. The portion attributable to the non-tribal lands of the United States⁴⁶ is then allocated equally to the owners of the improvements and the owners of the remaining lands comprising the Es-

⁴⁶Unlike Article 30, Article 19 does not allocate the *difference* between the amount of the Net Water Benefit that is allocable to the non-tribal lands of the United States, and the annual charges for those lands. This is because the annual charges for such lands other than transmission line rights-of-way are only \$3.00 and are not specifically allocated as between the non-tribal lands utilized by the Escondido Canal and those utilized by the Wohlford development.

condido Canal, and the latter allocation is credited ratably among the owners of the remaining lands according to the distance traversed by the Escondido Canal through those lands.

If the illustrative typical year had been one under Mutual's 1924 license as amended herein, the Net Water Benefit would have been \$104,321 (Opinion No. 36, at 198). 25% of the Net Water Benefit, or \$26,080, would have been allocated to the beneficial owners of the lands utilized by the Escondido Canal. Of that amount, \$14,855, or 56.96%, would have been allocated to the United States for the use, occupancy and enjoyment of its non-tribal lands utilized by the Escondido Canal.⁴⁷ And \$7,381, or 28.30%, would have been allocated to the three Bands as the first part of the annual charge for the use, occupancy and enjoyment of their tribal lands by the Escondido Canal.

50% of the \$14,855 that would have been allocable to the United States for its non-tribal lands utilized by the Escondido Canal, or \$7,428, would have been allocated to the remaining beneficial owners of those lands. And of that amount, \$4,885, or 65.76%, would have been allocated to the three Bands as the second part of the annual charge for the use, occupancy and enjoyment of their tribal lands by the Escondido Canal. Accordingly, the total annual charge placed to the credit of the three Bands would have been \$12,266, or 11.76% of the Net Water Benefit of Project No. 176.

Annual charges of \$3,812, or 31.08%, would have been credited to the La Jolla Band; \$2,493, or 20.32%, to the

⁴⁷The allocation of a portion of the Net Water Benefit to the non-tribal lands of the United States is not an increased *payment* to the United States; it is a partial measure of the ultimate credit to the three Bands.

Rincon Band; and \$5,961, or 48.60%, to the San Pasqual Band. Under the Bands' approach based on the cost of rerouting the Escondido Canal around their respective reservations, annual charges of \$7,114, or 58%, would have been credited to the La Jolla Band; \$3,803, or 31%, to the Rincon Band; and \$1,349, or 11%, to the San Pasqual Band. Authority is being reserved in Article 19 to authorize changing the inter-Band allocation formula without obtaining the agreement of the Licensee.

In Opinion No. 36, interest on annual charges for past periods was fixed at 7% per annum prior to October 10, 1974, and 9% per annum on and after that date, in accordance with the prevailing commercial rate of return utilized for refunds of excessive rates and charges as currently fixed by 18 CFR § 35.19a. The Licensees contend that Opinion No. 36 should have utilized the rates specified in 18 CFR § 11.21(b)(2) for determining annual charges for non-tribal lands of the United States, which were 6-3/8% for 1977, and 6-5/8% for 1978, and is 6-7/8% for 1979. That rate was described by the Commission in Order No. 560 issued December 29, 1976, as reflecting Federal long term borrowing costs, and as being more than nominal and less than a commercial rate.⁴⁸ While it is one thing to base rentals to the United States for its non-tribal lands on its long term borrowing costs, we think that interests on rentals for past periods to other beneficial owners of lands is more suitably based on prevailing commercial rates.⁴⁹

⁴⁸The rate specified in 18 CFR § 11.21(b)(2) is adapted from the U.S. Water Resources Council and has a statutory base in Pub. L. No. 93-251, § 80 (March 7, 1974). Accordingly, there would be no rate to apply back to 1969.

⁴⁹The date of this Opinion No. 36-A and order on rehearing will be treated as the "date of this amendment" for the purpose of paragraph (g) of Article 19, as amended herein. Accordingly, the initial filings should be made within 90 and 120 days, respectively, after the date hereof.

Indian Service Area (Article 29)

Reimbursement of the Cost of Canal Water (Article 31)

The Licensees contend that there is no statutory authority for Article 29, requiring them to permit diversions of water from the Escondido Canal to the Indian Service Area, and Article 31, requiring the La Jolla, Rincon and San Pasqual Bands to reimburse them for the "Cost of Canal Water". They say that California law governs matters pertaining to the consumptive use of water, and the geographic service areas in which municipalities distribute water. And they call attention to the fact that Section 27 of the Federal Power Act leaves intact California law relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or vested rights therein. The Licensees characterize Articles 29 and 31 as transferring "the benefits of the cheaper local water . . . at cost, to the new public beneficiaries living on lands within the Indian reservations," and contend that the Commission cannot "undertake the vast transfer of consumptive water rights as postulated by Articles 29 and 31."

Article 29 transfers no water rights owned by the Licensees. It merely requires them to permit diversions of water to the La Jolla, Rincon and San Pasqual Indian Reservations to the extent that those reservations are entitled to that water under applicable law. Litigation involving the water and related contractual rights which are incident to Project No. 176 has been pending for ten years. And our commitment under Article 28 of the 1979 license for Project No. 176 is to amend that license in any appropriate manner in conjunction with or following the final disposition of that litigation, so that the diversions of water ultimately authorized by the license will be consistent with the water and related contractual rights as ultimately resolved by the litigation.

The first proviso of Section 4(e) of the Federal Power Act prohibits the Commission from issuing a license within a reservation, including Indian reservations, if it is found that the license would interfere or be inconsistent with the purposes of the particular reservation. The Commission found, at 137-142, that a new license for Project No. 176 would interfere with the water supplies of the La Jolla and Rincon Indian Reservations and, consequently, with the purposes of those reservations, unless a new license would be conditioned to preclude such results. The Commission said, at 137, that Article 29 is the vehicle through which it was able to make an appropriate finding under Section 4(e) and, "consequently, it is the price in water of the power license issued herein."

The statements of the Commission's authority to permit diversions of water for consumptive use should be read in the foregoing light. Contrary to the Licensees' suggestion, the statement on page 136 that "the Commission has authority under Section 10(a) to require the modification of water rights incident to a project if such modification is necessary to enable the Commission to make a [non-interference] finding under Section 4(e)," is not a claim that the Commission has general authority to require licensees of water power projects to provide water to others for consumptive use other than as routinely provided in standard license forms. That question was not reached. The Commission's authority to provide water to the three Bands in this instance is bottomed, as indicated, on Section 10(a), but it is couched in terms of the ultimate judicial resolution of the dispute over the water and the related contracts, and is largely the product of the necessity of taking some action which would result in the allowance or disallowance of some water to the parties.

The Commission has long recognized that Section 27 of the Federal Power Act leaves State water law intact. Indeed, the Commission's lack of authority to adjudicate private rights to the use of water is the one aspect of this proceeding upon which all parties agree.

Although the water and related contractual rights have been in dispute, there are certain facets of those rights that are fairly clear. The Licensees do not contest the right of the La Jolla Band to an "ample supply and quantity of water" under the 1894 agreement. (Opinion No. 36, at 146.) The Rincon Band historically were farmers, diverting and appropriating water from the San Luis Rey River. (Opinion No. 36, at 8-9). And the San Pasqual Band has unquantified rights under Article 14 of the 1924 license to take water from the Escondido Canal for domestic purposes. (Opinion No. 36, at 144.) Considering that each of the three Bands was likely to have some water rights, it became obvious that "any resolution of the volumes and/or flows might be characterized as an adjudication of water rights, which the parties agree is not within the scope of this proceeding." (Opinion No. 36, at 143.)

In that light, Article 29 was fashioned upon the 1894 principle of providing an "ample supply and quantity of water", which is a contractual restatement of the Mission Indian Relief Act principle of supplying a "sufficient quantity of water for irrigating and domestic purposes". It was also fashioned upon Article 18 of the 1979 license for Project No. 176, which is the current version of Article 14 of the 1924 license and permits some consumptive use by others, and upon the Winters doctrine principle that permits holders of junior water rights to utilize water as long as the holders of the senior water rights have no *present* use for the water.

While our commitment is to cause Article 29 ultimately to conform to the judicial resolution of the water and related

contractual rights, it is obvious that displacements will occur until those rights are resolved. We could neither deny the three Bands all water pending a judicial decision, nor permit them to make unfettered use of the water pending such a decision. Nor could we refrain from acting in the proceeding because, in a sense, any such course arguably would have been an adjudication of private rights to water which is prohibited by Section 27.

On balance, we chose to permit the La Jolla, Rincon and San Pasqual Bands to go forward with their plans for irrigating their reservations. We chose not to impose any definite water limits in order to avoid any appearance of an adjudication of private rights to water. We anticipated that their plans would not proceed very far as long as the water rights litigation is pending, but we hoped that our action would help precipitate judicial action in that litigation.⁵⁰ Article 29 does not require the Licensees to provide any distribution services unless, of course, they choose to enter into private arrangements for such services. It requires them to permit diversions of water from the Escondido Canal to an area which probably should have been called the "Indian Diversion Area" rather than the "Indian Service Area", since it is not a true service area. Finally, it contemplates that the Bands will bear the costs of all facilities for diverting and utilizing the water, and that any Commission-authorized diversions in excess of the amounts ultimately adjudicated will be rolled back to conform to the ultimate judicial resolution of the water and related contractual rights.

⁵⁰In a filing made on October 11, 1979, the Licensees indicated that the United States District Court for the Southern District of California would decide at a hearing scheduled for November 5, 1979, among other matters, whether to proceed with the trial set for November 13, 1979.

In our opinion, such an approach under the circumstances of this proceeding, which are truly unique, is within our authority under the Federal Power Act and is not prohibited by Section 27.

License Amendment Filings (Article 27)

Article 27 of the 1979 license for Project No. 176 requires the Licensees to make certain filings within six months after its issuance. In view of the two year stay of the effective date of the license mandated by Section 14(b) of the Federal Power Act, we are modifying Article 27 to require the Licensees to make the filings within six months after the effective date of the license. The two year stay should obviate the time problems claimed by the Licensees.

Contractual Obligations (Article 34)

Article 34 of the 1979 license, requiring the Licensees to use their best efforts to fulfill their valid contractual obligations to supply electric power and water to the Bands, does not create any new contractual obligations, as suggested by the Licensees. In order to prevent any possible conflict between Article 34, requiring compliance with the 1914 agreement to provide water for the Rincon Indian Reservation⁵¹, and Article 29 (or Ordering Paragraph (F) of Opinion No. 36), requiring the Licensees to permit diversions of water to the Rincon Indian Reservation, the initial authorization of diversions should not be less than is required by Article 34 under the 1914 agreement. In other words, any contractual requirements which must be honored pur-

⁵¹On September 11, 1979, the United States District Court for the Southern District of California concluded that the 1914 agreement is void insofar as it purports to convey or limit the Rincon Band's water rights in the San Luis Rey River. Nonetheless, that agreement will continue to be "valid" for the purpose of Article 34 until the court ruling is final.

suant to Article 34 would be subsumed within the diversions that are authorized under Article 29 (or Ordering Paragraph (F) of Opinion No. 36). While we attempted to inject some meaning into the part of the 1922 agreement that pertains to the Pala Band, we are deleting the provision from Article 34 since the Licensees indicate that a well has been provided and others are planned under a stipulation filed with and approved by the United States District Court for the Southern District of California.

MISCELLANEOUS MATTER

The Cuca Road

On September 28, 1979, the Bands and Interior filed a motion for leave to file a Supplemental Petition for Rehearing to call attention to a recent development involving the Cuca Road, and on October 11, 1979, the Licensees filed an answer in opposition.

One of the interests in lands of Project No. 176 consists of a right-of-way from State Highway 76, through the privately owned Cuca Ranch and the La Jolla Indian Reservation, to the diversion dam. The right-of-way, or Cuca Road, incidentally provides the only access to portions of the La Jolla Indian Reservation. Although the easement owned by Mutual and Vista limits the use of the Cuca Road to their business purposes, the Joint Canal Superintendant in the past provided keys for the access gates to the members of the La Jolla Band who have had to use the road.

The Supplemental Petition for Rehearing states that since the issuance of Opinion No. 36 new owners of the Cuca Ranch have made matters more difficult for the affected members of the La Jolla Band. And, as a result, the Bands and Interior request the inclusion of a new condition in the 1979 license for Project No. 176 requiring the Licensees to permit the use of the Cuca Road by the appropriate members

of the La Jolla Band and their agents. Specifically, Interior states that it invokes Section 4(e) of the Federal Power Act to include the following condition:

The licensees shall make suitable arrangements for the use of the portion of the road from State Highway 76 to the diversion dam that traverses the Cuca Rancho by the La Jolla Band and its members and their agents, licensees or permittees who need the use of the road to obtain access to the lands of the La Jolla Indian Reservation south of the Cuca Rancho. In implementing this condition, the licensees are authorized to make full use of the power of eminent domain in conformity with Section 21 of the Federal Power Act, 16 U.S.C. § 814.

Insofar as the Supplemental Petition for Rehearing seeks to raise a problem with respect to the Cuca Road which has arisen since the issuance of Opinion No. 36, it is untimely under Section 313(a) of the Federal Power Act and inappropriate under § 1.34(b) of the Commission's Rules of Practice and Procedure as not specifying an alleged error in Opinion No. 36.

On the merits, Section 4(e) provides that a license shall be subject to and contain such conditions as Interior "shall deem necessary for the adequate *protection and utilization* of such reservation." (Emphasis added.) In context, a license shall be subject to and contain such conditions so that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired". The Bands and Interior have not alleged any conduct on the part of the Licensees to prompt us to impose the requested condition for that purpose. Indeed, they admit that the Joint Canal Superintendent has always provided the necessary keys in the past and that the present difficulties are being caused by the new owners of the Cuca Ranch who

are insisting upon strict compliance with the terms of the easement. The obvious purpose of the requested condition is to require the Licensees, rather than the La Jolla Band, to bear the cost of permitting the members of the La Jolla Band to gain access to part of their reservation by way of the Cuca Road. We find that any interference or inconsistency with the La Jolla Indian Reservation is not caused by Project No. 176, but is attributable entirely to the new owners of the Cuca Ranch. Under these circumstances, the request is not a proper one under Section 4(e) and is denied.

The Commission further finds:

The assignments of error and grounds for rehearing set forth in the applications for rehearing filed March 28, 1979, by Escondido, Mutual and Vista; Interior; and the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands, present no facts or legal principles which would warrant any change in or modification of Opinion No. 36 and order issued February 26, 1979, except as that Opinion and order is modified and clarified herein.

The Commission orders:

(A-1) Ordering Paragraph (A) of the Commission's order issued April 27, 1979, staying Ordering Paragraphs (B), (C), (D) and (F) of the Commission's Opinion No. 36 and order issued February 26, 1979, is hereby vacated.

(A-2) The effective date of Ordering Paragraph (B) of the Commission's Opinion No. 36 and order issued February 26, 1979, issuing a new license for Project No. 176, is hereby stayed pursuant to Section 14(b) of the Federal Power Act and § 16.10 of the Commission's Regulations Under the Federal Power Act, for a period of two years after the date of issuance of this Opinion No. 36-A and order on rehearing, after which period the stay shall terminate, unless

terminated earlier upon motion of the Secretary of the Interior or by action of Congress, or unless extended by action of Congress.

(A-3) The Secretary of the Commission shall notify the Congress of the stay granted by Ordering Paragraph (A-2).

(B) Ordering Paragraph (B) of the Commission's Opinion No. 36 and order issued February 26, 1979, issuing a new license for Project No. 176, is hereby modified as follows:

(B-1) Article 27 of Ordering Paragraph (B-3) of Opinion No. 36 is changed to begin as follows: "Within 6 months after the effective date of this license. . . ." And paragraph (2) of Article 27 is changed to begin as follows: "A permanent water operating plan for Project No. 176 which shall consider the needs of the Indian Service Area as defined in Article 29, as well as the service areas of the Licensees, including without limitation: . . ."

(B-2) Article 28 of Ordering Paragraph (B-3) of Opinion No. 36 is enlarged to add a second paragraph as follows:

Without changing the amount of annual charges in subparagraph (iii) of Article 30 for recompensing the United States for the use, occupancy and enjoyment of the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, other than as specified therein, the Commission may from time to time modify the provision in Article 30 for placing such annual charges in subparagraph (iii) to the credit of the La Jolla, Rincon and San Pasqual Bands of Mission Indians, respectively.

(B-3) Subparagraphs (ii) and (iii) of the first paragraph of Article 30 of Ordering Paragraph (B-3) of Opinion No. 36 are changed to read as follows:

(ii) For the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands other than tribal lands embraced within Indian reservations, comprising

355.76 acres utilized by the Escondido Canal and the Lake Wohlford development and acreage to be determined utilized by the Lake Henshaw development, a reasonable annual charge as determined by the Commission in accordance with its regulations in effect from time to time.

(iii) For the purpose of recompensing the United States for the use, occupancy and enjoyment of the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, other than the tribal lands within the Rincon Indian Reservation which are used and occupied for the generation of electric power, and other than certain tribal lands within the La Jolla, Rincon and San Pasqual Indian Reservations which are used and occupied for communication and other services by wire, a reasonable annual charge determined in the following manner and consisting of the sum of (A) and (B):

(A): Multiply twenty-five percent of the Net Water Benefit of Project No. 176 by a percentage which shall be determined by dividing the aggregate distance in feet traversed by the Escondido Canal through the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, by the total distance in feet traversed by the Escondido Canal from Station 1 through Station 302A, inclusive, which distances are to be determined as of the beginning of the calendar year.

(B): (1) Multiply twenty-five percent of the Net Water Benefit of Project No. 176 by a percentage which shall be determined by dividing the aggregate distance in feet traversed by the Escondido Canal through the lands of the United States other than tribal lands embraced within Indian reservations, by the total distance in feet traversed by the Escondido Canal from Station 1 through Station 302A, inclusive; (2) subtract from the foregoing computation, the part of the annual charges in subparagraph (ii) above for recom-

pensing the United States for the use, occupancy and enjoyment by the Escondido Canal of it lands other than tribal lands embraced within Indian reservations; (3) divide the foregoing difference by two; and (4) multiply the foregoing quotient by a percentage which shall be determined by dividing the aggregate distance in feet traversed by the Escondido Canal through the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, by the difference between the total distance in feet traversed by the Escondido Canal from Station 1 through Station 302A, inclusive, and the aggregate distance in feet traversed by the Escondido Canal through the lands of the United States other than tribal lands embraced within Indian reservations.

(B-4) The third sentence of the fourth paragraph of Article 30 of Ordering Paragraph (B-3) of Opinion No. 36 is changed to begin as follows: "Second, the sum of (A) and (B) in the computation of the Gross Water Benefit of Project No. 176 shall be placed tentatively to the credit of the respective Bands. . . ."

(B-5) The second sentence of the second paragraph of Article 34 of Ordering Paragraph (B-3) of Opinion No. 36, pertaining to the agreement of June 28, 1922, is deleted.

(B-6) Ordering Paragraph (B-6) of Opinion No. 36 is vacated.

(B-7) Ordering Paragraph (B) of Opinion No. 36, as modified by this Ordering Paragraph (B), is final. The failure of the Licensees to seek judicial review of Opinion No. 36, as modified by this Opinion No. 36-A and order on rehearing, pursuant to Section 313(b) of the Federal Power Act, shall (notwithstanding the stay of the effective date as provided in Ordering Paragraph (A-2)) constitutes acceptance of the license for Project No. 176. In acknowledgment

of this acceptance of the license and its terms and conditions as modified, and notwithstanding the stay of the effective date as provided in Ordering Paragraph (A-2), the license shall be signed for the Licensees and returned to the Commission within 60 days from the date of issuance of this Opinion and order on rehearing.

(C) Ordering Paragraph (C) of the Commission's Opinion No. 36 and order issued February 26, 1979, issuing a new license for Project No. 559, is hereby modified to correct subparagraph (i) of Ordering Paragraph (C-2) to read as follows:

(i) All lands, the use and occupancy of which are necessary or appropriate for the purposes of the project, constituting the project area and enclosed by the project boundary, which area consists of the 40-foot wide right-of-way beginning at the boundary of Project No. 176 enclosing the power house within the Rincon Indian Reservation, and extending approximately 0.6 miles in a northerly direction to Pole No. 12,111, which right-of-way is occupied by a 12 kV primary transmission line connecting the power house within the Rincon Indian Reservation and the Licensee's 12 kV Circuit No. 216 at Pole No. 12,111.

(D) Ordering Paragraph (D) of the Commission's Opinion No. 36 and order issued February 26, 1979, amending Article 19 of the 1924 license for Project No. 176, is hereby amended in its entirety to read as follows:

(D) Article 19 of the license for Project No. 176 issued to Escondido Mutual Water Company on June 25, 1924, as amended, is hereby amended as of September 23, 1969, with respect to the tribal lands of the La Jolla and Rincon Bands of Mission Indians, and as of May 26, 1970, with respect to the tribal lands of the San Pasqual Band of Mission Indians, as follows:

(D-1) Paragraph (d) of Article 19 is deleted, and a new paragraph (d) is added, as follows:

For the purpose of recompensing the United States for the use, occupancy and enjoyment of the tribal lands embraced within the Rincon and San Pasqual Indian Reservations comprising the right-of-way for the former Rincon-Bear Valley transmission line, a reasonable annual charge of \$8.00 per mile until the date of restoration of the lands authorized by the license to be used for the line, which annual charge shall be placed to the credit of the Rincon and San Pasqual Bands of Mission Indians, respectively, in proportion to the acreage occupied within their respective reservations by the right-of-way for the line.

(D-2) A new paragraph (e) is added to Article 19, as follows:

For the purpose of recompensing the United States for the use, occupancy and enjoyment of the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, other than the tribal lands within the Rincon Indian Reservation which are used and occupied for the generation of electric power, and other than the tribal lands within the Rincon and San Pasqual Indian Reservations comprising the right-of-way for the former Rincon-Bear Valley transmission line, a reasonable annual charge determined in the following manner and consisting of the sum of (A) and (B):

(A): Multiply twenty-five per cent of the Net Water Benefit of Project No. 176 by a percentage which shall be determined by dividing the aggregate distance in feet traversed by the Escondido Canal through the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, by the total distance in feet traversed by the Escondido Canal from Station 1 through Station

302A, inclusive, which distances are to be determined as of the beginning of the calendar year.

(B): (1) Multiply twenty-five per cent of the Net Water Benefit of Project No. 176 by a percentage which shall be determined by dividing the aggregate distance in feet traversed by the Escondido Canal through the lands of the United States other than tribal lands embraced within Indian reservations, by the total distance in feet traversed by the Escondido Canal from Station 1 through Station 302A, inclusive; (2) divide the foregoing computation by two; and (3) multiply the foregoing quotient by a percentage which shall be determined by dividing the aggregate distance in feet traversed by the Escondido Canal through the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, by the difference between the total distance in feet traversed by the Escondido Canal from Station 1 through Station 302A, inclusive, and the aggregate distance traversed by the Escondido Canal through the lands of the United States other than tribal lands embraced within Indian reservations.

For the purpose of this paragraph (c): The Term "Net Canal Water" is defined as the volume of water which leaves the Escondido Canal during a calendar year. The term "Cost of Canal Water" is defined as the cost to the Licensee and Vista Irrigation District of operating the water supply facilities of Project No. 176 and the Henshaw development during a calendar year, multiplied by 4,143 acre-feet, and divided by the number of acre-feet comprising the Net Canal Water during the same calendar year. The term "Cost of Alternative Water" is defined as the computed cost to the Licensee of obtaining 4,143 acre-feet of water for a calendar year from the least expensive source, as weighted for the Licensee's percentage domestic-agricultural distribution pattern for the same calendar year. And

the term "Net Water Benefit" is defined as the difference between the Cost of Alternative Water and the lower Cost of Canal Water for a calendar year.

The said annual charges in this paragraph (e) for the use, occupancy and enjoyment of the tribal lands embraced within the La Jolla, Rincon and San Pasqual Indian Reservations, shall be placed to the credit of the La Jolla, Rincon and San Pasqual Bands of Mission Indians, respectively, in proportion to the respective distances traversed by the said conduit through their respective lands.

Without changing the amount of annual charges in this paragraph (e) for recompensing the United States for the use, occupancy and enjoyment of the tribal lands embraced with the La Jolla, Rincon and San Pasqual Indian Reservations, other than as specified herein, the Commission may from time to time change the provision for placing such annual charges in this paragraph (e) to the credit of the La Jolla, Rincon and San Pasqual Bands of Mission Indians, respectively.

(D-3) A new paragraph (f) is added to Article 19, as follows:

For the purpose of recompensing the United States for the use, occupancy, and enjoyment of the tribal lands embraced within the Rincon Indian Reservation which are used and occupied for the generation of electric power, a reasonable annual charge equal to fifty per cent of the Net Rincon Power Benefit of Project No. 176.

For the purpose of this paragraph (f): The term "Cost of Rincon Power" is defined as the cost to the Licensee of operating and maintaining the Rincon power facilities (including property taxes and amortization attributable thereto), and all demand, energy and other charges incurred for power purchased and resold to the Rincon Band of Mission Indians,

during a calendar year. The term "Rincon Power Revenues" is defined as the sum of all demand, energy and other charges invoiced for power purchased and resold to the Rincon Band of Mission Indians, during the same calendar year. And the term "Net Rincon Power Benefit" is defined as the difference between the Rincon Power Revenues and the lower Cost of Rincon Power for a calendar year.

The said annual charges in this paragraph (f) for the use, occupancy and enjoyment of tribal lands embraced within the Rincon Indian Reservation shall be placed to the credit of the Rincon Band of Mission Indians.

(D-4) A new paragraph (g) is added to Article 19, as follows:

The Licensee shall file with the Commission and serve upon designees of the La Jolla, Rincon and San Pasqual Bands of Mission Indians and the Department of the Interior, on or before February 1 of each year, a statement under oath showing all of the information which is necessary or useful for the computation and crediting of annual charges as provided in this Article 19, together with its computations. The La Jolla, Rincon and San Pasqual Bands of Mission Indians and the Department of the Interior may file with the Commission and transmit to the Licensee and the others mentioned in this paragraph, on or before March 1 of each year, a statement under oath in opposition to the said information and computations. Such statements shall be considered and acted upon by the Commission officer who is then performing the functions which are performed at the time of this amendment by the Director of the Division of Licensed Projects, Office of Electric Power Regulation, or that officer's Deputy, to whom authority to act is hereby delegated.

The initial filing under this paragraph (g) covering all past periods shall be made within 90 days after the date of

this amendment, and the initial filing in opposition, if any, shall be made within 120 days after the date of this amendment.

(D-5) A new paragraph (h) is added to Article 19, as follows:

The Licensee shall pay interest on the annual charges applicable to the tribal lands of the La Jolla, Rincon and San Pasqual Bands of Mission Indians (in excess of the amounts previously paid in the case of the San Pasqual Band) at the rate of 7% per annum on amounts payable prior to October 10, 1974; at the rate of 9% per annum on amounts accruing on and after October 10, 1974, on amounts payable prior to that date; and at the rate of 9% per annum on amounts payable on and after October 10, 1974, to the date(s) of payment.

(E) The motion filed by the Bands on May 21, 1979, to strike a portion of Mutual's, Escondido's and Vista's petition for rehearing, is denied.

(F) The Motion for Leave to File Supplemental Application for Rehearing and the Supplemental Petition for Rehearing, filed by the Bands and Interior on September 28, 1979, are denied insofar as they request the inclusion of another condition in Ordering Paragraph (B) of the Commission's Opinion No. 36 and order issued February 26, 1979, issuing a new license for Project No. 176.

By the Commission. Commissioner Holden voted present.

(SEAL)

Kenneth F. Plumb,
Secretary.

**Act of January 12, 1891, 26 Stat. 712
(Mission Indian Relief Act).**

The preamble to the Act provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
That immediately after the passage of this act the Secretary of the Interior shall appoint three disinterested persons as commissioners to arrange a just and satisfactory settlement of the Mission Indians residing in the State of California, upon reservations which shall be secured to them as hereinafter provided.

Section 2 provides, *inter alia*:

Sec. 2. That it shall be the duty of said commissioners to select a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the President and Secretary of the Interior.

Section 8 provides:

Sec. 8. That previous to the issuance of a patent for any reservation as provided in section three of this act the Secretary of the Interior may authorize any citizen of the United States, firm, or corporation to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such reservation for agricultural, manufacturing, or other purposes, upon condition that the Indians owning or occupying such reservation or reservations shall, at all times during such ownership or occupation, be supplied with sufficient quantity of water for irrigating and domestic purposes upon such terms as shall be prescribed in writing by the Secretary of the Interior,

and upon such other terms as he may prescribe, and may grant a right of way for rail or other roads through such reservation: *Provided*, That any individual, firm, or corporation desiring such privilege shall first give bond to the United States, in such sum as may be required by the Secretary of the Interior, with good and sufficient sureties, for the performance of such conditions and stipulations as said Secretary may require as a condition precedent to the granting of such authority: *And provided further*, That this act shall not authorize the Secretary of the Interior to grant a right of way to any railroad company through any reservation for a longer distance than ten miles. And any patent issued for any reservation upon which such privilege has been granted, or for any allotment therein, shall be subject to such privilege, right of way, or easement. Subsequent to the issuance of any tribal patent, or of any individual trust patent as provided in section five of this act, any citizen of the United States, firm, or corporation may contract with the tribe, band, or individual for whose use and benefit any lands are held in trust by the United States, for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose.

Federal Power Act § 3(2), 16 U.S.C. § 796(2).

(2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

Federal Power Act § 4(e), 16 U.S.C. § 797(e).

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by

the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

Federal Power Act § 10(a), 16 U.S.C. § 803(a).

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

Federal Power Act § 10(e), 16 U.S.C § 803(e).

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States

shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of Title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power

created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

Federal Power Act § 10(i), 16 U.S.C. § 803(i).

In issuing licenses for a minor part only of a complete project, or for a complete project of not more than two thousand horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this Part, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: Provided, That the provisions hereof shall not apply to annual charges for use of lands within Indian reservations. [Sec. 10(i) as amended by the Act of August 26, 1935 and Sept. 7, 1962.]

Federal Power Act § 14, 16 U.S.C. § 807.

(a) Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof [16 USCS § 796], and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects

taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act [16 USCS §§ 791a et seq.], by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: Provided, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act [16 USCS §§ 791a et seq.] at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

(b) No earlier than five years before the expiration of any license, the Commission shall entertain applications for a new license and decide them in a relicensing proceeding pursuant to the provisions of section 15 [16 USCS § 808]. In any relicensing proceeding before the Commission any Federal department or agency may timely recommend, pursuant to such rules as the Commission shall prescribe, that the United States exercise its right to take over any project or projects. Thereafter, the Commission,

if its [it] does not itself recommend such action pursuant to the provisions of section 7(c) of this part [16 USCS § 800(c)], shall upon motion of such department or agency stay the effective date of any order issuing a license, except an order issuing an annual license in accordance with the proviso of section 15(a) [16 USCS § 808(a)], for two years after the date of issuance of such order, after which period the stay shall terminate, unless terminated earlier upon motion of the department or agency requesting the stay or by action of Congress. The Commission shall notify the Congress of any stay granted pursuant to this subsection."

Federal Power Act § 15(a), 16 U.S.C. § 808(a).

(a) If the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 807 of this title, the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 807 of this title: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.

Federal Power Act § 15(b), 16 U.S.C. § 808(b).

(b) In issuing any licenses under this section except an annual license, the Commission, on its own motion or upon application of any licensee, person, State, municipality, or State commission, after notice to each State commission and licensee affected, and after opportunity for hearing, whenever it finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licensed project should no longer be used or adapted for use for power purposes, may license all or part of the project works for nonpower use. A license for nonpower use shall be issued to a new licensee only on the condition that the new licensee shall, before taking possession of the facilities encompassed thereunder, pay such amount and assume such contracts as the United States is required to do, in the manner specified in section 14 [16 USCS § 807] hereof. Any license for nonpower use shall be a temporary license. Whenever, in the judgment of the Commission, a State, municipality, interstate agency, or another Federal agency is authorized and willing to assume regulatory supervision of the lands and facilities included under the nonpower license and does so, the Commission shall thereupon terminate the license. Consistent with the provisions of the Act of August 15, 1953 (67 Stat. 587) [16 USCS §§ 828 et seq.], every licensee for nonpower use shall keep such accounts and file such annual and other periodic or special reports concerning the removal, alteration, nonpower use, or other disposition of any project works or parts thereof covered by the nonpower use license as the Commission may by rules and regulations or order prescribe as necessary or appropriate.

Federal Power Act § 27, 16 U.S.C. § 821.

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control,

appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

Federal Power Act § 29, 16 U.S.C. § 823.

All Acts or parts of Acts inconsistent with this chapter are repealed: *Provided*, That nothing contained in this chapter shall be held or construed to modify or repeal any of the provisions of the Act of Congress approved December 19, 1913, granting certain rights-of-way to the city and county of San Francisco, in the State of California.